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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

NATIONAL SALVAGE & SERVICE CORPORATION,
Petitioner,

v.

COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented:

1. Under the Commerce Clause, may a State enjoin a business from unloading non-hazardous solid waste from railcars to trucks without a permit where all waste shipped by rail in the state originates from out-of-state, and where the purpose and effect of the permit requirement is to stop out-of-state rail shipments of waste from reaching in-state landfills?

2. Under the Due Process Clause, may a State enjoin a business from unloading solid waste from railcars to trucks without a permit where none of the State's statutes or regulations requires a permit for that activity?

3. May a State classify a waste unloading business as a "transfer station" for which a permit is required under State law notwithstanding that the business does not fall within the express terms of the regulatory definition of "transfer station" and the administrative agency charged with enforcing the permit requirement has previously determined, and all the evidence of record shows, that the business is not a "transfer station"?

4. May a State preliminarily enjoin a business from operating without any finding or showing of an imminent, irreparable injury, inadequacy of a remedy at law, or any of the other factors traditionally considered by court of equity?

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PETITION FOR A WRIT OF CERTIORARI TO THE THE INDIANA SUPREME COURT

Petitioner National Salvage & Service Corporation[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Court of Appeals entered in the above-entitled proceeding on May 15, 1991, as left undisturbed by the Indiana Supreme Court on March 5, 1992.

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[1]National Salvage is a closely held corporation, having no parent or subsidiary.

OPINIONS BELOW

The November 16, 1989 judgment of the circuit court of Marion County, Indiana, ordering National Salvage & Service Corporation ("National Salvage") to cease removing solid waste from railroad boxcars to trucks without first obtaining a permit from the Indiana Department of Environmental Management has not been reported. The opinion of the Indiana court of appeals affirming the trial court judgment is reported at 571 N.E.2d 548 (Ind. App. 1991). The 3-2 decision of the Indiana supreme court denying further appellate review of the judgment of the Marion County circuit court is not reported. Copies of these decisions are reprinted in the appendix, infra.

JURISDICTION

This suit was filed by the respondent in the Marion County circuit court under

provisions of the Indiana Environmental Management Act, Ind. Code 13-7-5-7 and 13-7-12-2, and provisions of the Indiana Administrative Code, 329 IAC 2-2-1. On the day the suit was filed, October 27, 1989, the respondent obtained an ex parte temporary restraining order requiring petitioner to cease its business operation.

The case was tried to the court on November 15, 1989. On November 16, 1989, the circuit court entered its Findings of Fact, Conclusions of Law and Judgment granting the respondent's request for preliminary injunctive relief.

Petitioner appealed to the Indiana court of appeals. The court of appeals affirmed on May 15, 1991. No motion for rehearing was filed.[2]

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[2]Motions for rehearing are available under Rule 11, Indiana Rules of Appellate Procedure, but are not required for seeking further review by the Indiana supreme court.

On June 4, 1991, petitioner timely filed a petition for transfer[3] of the case to the Indiana supreme court. The Indiana supreme court heard oral argument on the petition on March 4, 1992. On March 5, 1992, the supreme court denied transfer, without opinion, by a 3-2 vote. No motion for rehearing was filed.[4]

On May 26, 1992, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including August 3, 1992.

Petitioner contends that the decision of the Indiana court of appeals, as left

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[3]In Indiana, the party against whom a decision is rendered by the court of appeals has a right to petition for "transfer" to the Indiana Supreme Court for further review. The grounds upon which transfer may be granted are set forth in Rule 11(B) of the Indiana Rules of Appellate Procedure.

[4]Motions for rehearing from a denial of transfer are not provided for by the Indiana appellate rules. See Rule 11(B)(8), Ind. R. App. P.

undisturbed by the Indiana supreme court, offends the due process and commerce clauses of the United States Constitution and contravenes decisions of this Court. The jurisdiction of the United States Supreme Court to review the decision of the Indiana court of appeals is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution, Art. I, § 8, which provides:

> "The Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States,..."

This case also involves the Due Process Clause of § 1 of the Fourteenth Amendment, which provides:

> "No State...shall...deprive any person of life, liberty, or property, without due process of law;..."

The statutes involved in this case include Ind. Code 13-7-5-7 and 13-7-12-2. Ind. Code 13-7-5-7 generally empowers the commissioner of the Indiana Department of Environmental Management ("IDEM") to "proceed in court, by appropriate action...to procure compliance" with Indiana's environmental statute or rules. Ind. Code 13-7-12-2 specifically empowers the commissioner to seek an injunction against any pollution source which presents an "imminent and substantial endangerment" to the health or livelihood of persons.

The Indiana regulations involved in this case include 329 Indiana Administrative Code ("IAC") 2-2-8, which establishes requirements and procedures for issuance of solid waste permits; 329 IAC 2-2-1(b)(55), which defines the term "solid waste processing facility" and requires such facilities to have a permit; and 329

IAC 2-2-1(b)(58), which defines the term "transfer station."

These statutes and regulations are reprinted in the appendix at the close of this brief.

STATEMENT OF THE CASE

From October 13 to October 19, 1989, petitioner National Salvage & Service Corporation ("National Salvage"), an Indiana corporation, was engaged in the shipment of municipal solid waste by rail from out-of-state for disposal in Indiana landfills. National Salvage operated at a warehouse at 1931 East Stout Field Drive in Indianapolis, where it off-loaded bales of solid waste from train boxcars to trucks. Railroad boxcars would pull up on a rail siding next to the warehouse. A canvas sleeve would extend out from the warehouse door to the boxcar door. A forklift would drive up to the boxcar, lift out one bale

of waste, back out of the car, travel across the floor of the warehouse without ever placing the bale on the warehouse floor and place the bale into a truck backed up to another warehouse door. The back of the truck was connected to the warehouse by another canvas sleeve. After a truck was filled it was driven to a nearby landfill and another truck would take its place for receipt of more bales.

When National Salvage first began exploring the possibility of engaging in unloading solid waste from railcars to trucks, it asked IDEM if any permit would be required. In February 1989, Curtis Schopp, Vice President of National Salvage, made this inquiry in person at IDEM and was directed to and met with C. Steven Poe, chief of the Facility Inspection Section for Southern Indiana in IDEM's solid waste branch. Mr. Poe is one of two section chiefs reporting directly to the chief of

IDEM's solid waste management branch. Mr. Schopp explained in detail the unloading operation, and Mr. Poe advised Mr. Schopp that no permit was required.[5] No written statement of the lack of need to obtain a permit was obtained, but no evidence was presented by IDEM at trial that in any way even suggested that this conversation did not occur precisely as Mr. Schopp described it.

Mr. Schopp was not the only person IDEM told that no permit was needed for such an operation. In April 1989, Tucker Lampkin, a New Jersey solid waste railroad transportation consultant, was advised by William Myers, another IDEM employee, that no permit for unloading solid waste from

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[5]Mr. Poe stated that if IDEM required a permit for the waste unloading operation National Salvage was considering, IDEM would have to require permits "for every roll-off box in the state." A "roll-off box" is a large steel container used at commercial sites for waste collection.

train cars to trucks was required by the Indiana solid waste rules. Again, IDEM presented no evidence at trial challenging this representation. Mr. John Miller of Avanti Real Estate personally visited with C. Steven Poe and Stuart Miller (Mr. Poe's opposite member as IDEM's section chief for solid waste for northern Indiana) in May 1989, and was given the same information. Once more, these facts were not challenged by IDEM at the hearing.

Based on IDEM's statements that no permit was required for the unloading operation National Salvage proposed, National Salvage entered into binding commitments with generators of municipal solid waste from Pennsylvania and New Jersey to accept baled municipal solid waste from those generators for rail transportation to Indianapolis. In other ways, National Salvage acted in reliance on IDEM's representations.

By the time National Salvage began operating on October 13, 1989, the shipment of waste from out-of-state had become a significant public issue in Indiana. Several articles on the subject appeared in the press. Prior to the commencement of this suit, the Governor of Indiana vowed in press reports to "get this out-of-state garbage where it belongs -- out-of-state."[6] Shortly after this suit was filed, the Office of the Governor reiterated that it was "cracking down" against trains and motor carriers carrying municipal solid waste into Indiana.[7]

In the wake of this publicity, National Salvage asked IDEM to confirm its view that no permit was needed for

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[6]See "State Banishes Boxcars Loaded With Smelling Trash," Indianapolis Star, October 19, 1989, p. 1.

[7]See "Governor Bayh Orders Crackdown on Garbage Haulers," Press Release, Office of the Governor, November 9, 1989.

unloading waste from train cars to trucks. On October 26, 1989, IDEM responded that a permit would be required after all. IDEM's then-Deputy Commissioner Richard Gordon personally telephoned National Salvage to relate IDEM's decision, which he stated had been the result of a considerable amount of deliberation the night before. Mr. Gordon threatened to impose large fines upon National Salvage. Less than 24 hours later, on October 27, 1989, IDEM filed this suit against National Salvage.

In Indiana, the law requires that the permit program for solid waste activities be developed by administrative rules. Ind. Code 13-7-10-1(a) states that "each [IDEM] board [the Solid Waste Management Board, the Air Pollution Control Board and the Water Pollution Control Board] shall establish, by rules adopted under Ind. Code 4-22-2, requirements and procedures for the issuance of permits." The Solid

Waste Management Board was created by Ind. Code 13-7-1-12 and is empowered to promulgate rules to regulate solid and hazardous waste.

Pursuant to the statutory mandate in Ind. Code 13-7-10-1(a), the Solid Waste Management Board promulgated 329 IAC 2-8, a rule establishing requirements and procedures for issuance of permits for solid waste activities. Section 1 of that rule establishes the only permit requirements that have been adopted for solid waste. That section provides ". . . any person who disposes of solid waste or operates a solid waste processing facility must have a solid waste facility permit" (emphasis added).

A "solid waste disposal facility" is defined as a "solid waste facility in or upon the land into which solid waste is disposed." 329 IAC 2-2-1(b)(54). There are three types of solid waste land

disposal facilities, namely (1) a construction/demolition site; (2) a restricted waste site; or (3) a sanitary landfill. None of National Salvage's activities falls within these defined categories of disposal facilities, and the Indiana court of appeals so held in this case. 571 N.E.2d at 554.

The only other type of solid waste activity requiring a permit is a solid waste processing facility, which is defined at 329 IAC 2-2-1(b)(55) as "a solid waste facility upon which is located a: (1) solid waste incinerator, (2) transfer station, (3) solid waste baler, (4) solid waste shredder, (5) resource recovery system, (6) composting facility, or (7) garbage grinding facility." National Salvage showed at trial that its operation was not any of these facilities. IDEM agreed. As IDEM stated in its Appellee's Brief filed with the Indiana court of appeals at p. 13:

"Certainly, National Salvage was not operating an incinerator, transfer station, solid waste baler or shredder, etc."

Despite IDEM's view that National Salvage was none of the operations listed in the regulatory definition of "solid waste processing facility," IDEM insisted that National Salvage still had to have a "solid waste processing facility" permit because National Salvage was a "solid waste facility" and it was engaged in waste "processing," as defined in 329 IAC 2-2-1(41). IDEM presented no authority for this combined reading of "solid waste facility" and "processing" to yield a "solid waste processing facility" permit requirement.

The trial in this action was conducted on November 15, 1989. National Salvage filed a prehearing brief that morning that argued, among other things, that no Indiana statute or rule imposed a permit

requirement on National Salvage; that imposition of such a requirement was being sought by IDEM to disrupt the flow of waste from outside Indiana into Indiana landfills; that IDEM's actions violated the Commerce Clause; and that if IDEM's reading of its regulations was correct, and National Salvage really did need to have a permit, then the regulations were unconstitutionally vague and should be stricken. National Salvage also argued that no injunction should issue absent IDEM's showing a balance of traditional equitable factors weighing in favor of the injunction. The factors should include the existence of an imminent and irreparable danger from National Salvage's operation; a likelihood of success on the merits; the inadequacy of IDEM's remedies at law; and an overwhelming public interest in favor of the injunction that would overcome the

great harm to National Salvage from being put out of business.

IDEM responded to almost none of these points. IDEM presented no evidence at trial that National Salvage posed any health or environmental threat, much less an imminent or substantial one. IDEM's investigators did not sample the waste National Salvage was unloading or conduct any testing to evaluate whether any aspect of National Salvage's operation raised any kind of environmental problem. IDEM did not rebut any of National Salvage's evidence showing that IDEM was acting intentionally to harm National Salvage and halt out-of-state waste in violation of the Commerce Clause. IDEM argued that because National Salvage had to have a permit, IDEM did not have to show any balancing of traditional equitable factors in IDEM's favor to merit entry of injunctive relief.

On November 16, the trial court issued its Findings of Fact, Conclusions of Law, and Judgment. The court ordered National Salvage to

> "cease and desist from operating any facility in the State of Indiana which handles solid waste, including the removal of waste from railroad boxcars and placement into trucks for later disposal, or the removal of solid waste from one vehicle to another, without first obtaining a solid waste permit from the Commissioner of the Indiana Department of Environmental Management."

The court denied IDEM's claim for a civil penalty because the "uncontroverted evidence that reliance was placed on the oral representations of [IDEM's Chief of Facility Inspections Section] Mr. [C. Steven] Poe is a mitigating circumstance and no civil penalty is therefore imposed." The court did not address any of National Salvage's arguments or evidence concerning the Commerce Clause.

National Salvage appealed. National Salvage reiterated its Commerce Clause and Due Process arguments in its "Appellant's Brief," pp. 18-45, and "Appellant's Reply Brief," pp. 1-37, filed with the court on February 27, 1990 and May 23, 1990, respectively. On May 15, 1991, the Indiana court of appeals upheld the injunction. In a written opinion (hereafter, "Appeals Op."), the court stated that a permit was required for the type of activity National Salvage was engaged in, but not for the reasons relied upon by IDEM or the trial court. The court of appeals rejected IDEM's combined reading of the definitions of "solid waste facility" and "processing" as a basis for imposing a "solid waste processing facility" permit requirement upon National Salvage. Instead, the Indiana court of appeals concluded a permit was needed because National Salvage was a "transfer station," which is one of the

operations listed under the definition of "solid waste processing facility," 329 IAC 2-2-1(b)(55). The term "transfer station" is defined at 329 IAC 2-2-1(b)(58) as "a facility at which solid waste is transferred into larger capacity vehicles or containers for further transportation...." (emphasis supplied). National Salvage and IDEM had agreed at trial and during the appellate briefing that a "transfer station" was understood in the waste industry to be a place where waste is unloaded from trash pickup trucks, compacted, then loaded onto larger trucks for longer trips to landfills for final disposal. In other words, "transfer station" means a facility where waste is transferred from smaller vehicles, combined with other waste and placed into larger ones. National Salvage operated, as the evidence showed, to remove baled waste

without any compacting or "processing"[8] from larger vehicles (railcars) to smaller ones (trucks). The court of appeals, however, held the definition of "transfer station" to be ambiguous, susceptible to an absurd result if construed literally ("...the definition...could be construed as meaning vehicles which are larger than the facility," Appeals Op., 571 N.E.2d at 554) and thus subject to judicial interpretation. Id. In construing "transfer station," the court of appeals did not discuss IDEM's construction of the

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[8]The term "processing" is defined at 329 IAC 2-2-1(b)(41) as the method, system, or other handling of solid waste so as to change its chemical, biological, or physical form, or to render it more amenable for disposal or recovery of materials or energy, or the transfer of solid waste materials but excluding the transportation of solid waste. National Salvage did not engage in "processing" because the baled waste was moved intact, without making any changes in the chemical, biological or physical form of the waste. The bales of waste never even touched the ground. Every part of National Salvage's activity was a form of transportation.

term but instead relied upon a new Indiana statute, P.L. 19-1990, Sec. 19, enacted after the onset of this litigation, which for the first time statutorily defined "transfer station" to mean "a facility where solid waste is transferred from a vehicle or a container to another vehicle or container for transportation." The court of appeals found that the new statute was a clarification of existing law, not a substantive change in law, because Section 41 of P.L. 19-1990 so provided.[9] Appeals Op., 571 N.E.2d at 555. The court of appeals held that it could use the legislature's clarification to ascertain the "legislative intent" of the IDEM-promulgated rule defining "transfer

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[9]Significantly, the new statute also provided that the change in the definition of "transfer station" did not affect (1) rights or liabilities accrued; (2) penalties incurred; (3) violations committed; or (4) legal proceedings commenced before the date the new law became effective.

station," 329 IAC 2-1-1(58), and the court adopted the new statutory definition as the proper construction of the regulatory term. Appeals Op., 571 N.E.2d at 555. The court of appeals stated that adoption of the new statutory definition as the meaning of the regulatory term was "not a retroactive application of a change but merely a clarification." Id.

The court of appeals held that the ambiguities in IDEM's rules did not render the rules unconstitutionally vague under the Due Process Clause. Appeals Op., 571 N.E.2d at 555-56. The court characterized IDEM's permit requirements as an "economic regulation," 571 N.E.2d at 556, despite the substantial civil penalties sought by IDEM in this case and the fact that criminal penalties also are provided by statute for negligent violations of the law or rules.

The court of appeals held that although the trial court may have erred in

not considering National Salvage's arguments and evidence that IDEM's efforts to impose a permit requirement in this case violated the Commerce Clause of the United States Constitution, such error was harmless because IDEM's permit requirement was an "evenhanded" requirement that did not discriminate against out-of-state municipal solid waste. Appeals Op., 571 N.E.2d at 560.

On June 4, 1990, National Salvage petitioned the Indiana supreme court to grant transfer of the case for further review. In its brief in support of the petition, National Salvage once again raised objections to the trial court's injunction order under the Commerce Clause. See Transfer Brief, pp. 39-44. National Salvage also objected on due process grounds based on IDEM's unambiguous written rule excluding facilities like National Salvage from coverage under the "transfer

station" definition and also based on IDEM's consistent determination that National Salvage was not a transfer station. Transfer Brief, pp. 23-27. National Salvage also argued that the trial court was without power to enjoin National Salvage from operating without any showing of an immediate, irreparable and substantial injury to the public or environment from National Salvage's continued operation, and without weighing any of the factors traditionally considered by courts in determining whether to grant injunctive relief. Transfer Brief, pp. 33-39. National Salvage orally argued all these points to the Indiana supreme court on March 4, 1992. The supreme court, by a 3-2 vote, and without opinion, denied the petition for transfer on March 5, 1992.

The effect of this lawsuit and IDEM's actions has been to bar interstate shipment of solid waste by rail into Indiana. That

is because in Indiana, shipment of municipal solid waste by rail exclusively involves waste originating from out-of-state. The uncontested evidence at trial showed that rail transportation of waste is economically feasible only over great distances. Thus, all solid waste moved by rail -- in Indiana and elsewhere -- involves interstate transport. Requiring National Salvage to obtain an IDEM permit guarantees that National Salvage will never operate because IDEM has virtually frozen all permit applications dead in their tracks. It now takes years to obtain any action from IDEM on any kind of solid waste permit applications.[10] IDEM knew this, and

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[10]See Solid Waste Flow And Disposal Patterns In The State Of Indiana, a January 1992 report prepared for the National Solid Wastes Management Association by SCS Engineers of Cincinnati, Ohio, which reported that applications for permits for new sanitary landfills then on file with IDEM had been pending for up to six years. Solid Waste Flow, p. 4. The report showed that Indiana exports approximately 423,000

the evidence at the trial showed that IDEM's purpose in shutting down National Salvage was to stop out-of-state waste from being disposed of in landfills in Indiana.

This case was decided before this Court's decision on June 1, 1992 in Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, __ U.S. __, 112 S.Ct. 2019 (1992), in which this Court reaffirmed Philadelphia v. New Jersey, 437 U.S. 617 (1978), and elaborated on the limitations imposed by the Commerce Clause on the power of states to interfere with the interstate movement of waste. [National Salvage respectfully suggests that the decision of the Indiana court of appeals, left undisturbed by the Indiana supreme court, is inconsistent with the

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tons of solid waste per year, about six percent of the total generated in state. Solid Waste Flow, p. 10. In fact, Indiana is a net exporter of solid waste to three of the four contiguous states. Solid Waste Flow, p. 4.

holding and rationale of Fort Gratiot Sanitary Landfill.]

National Salvage also suggests that Indiana's imposition of a permit requirement offends an uninterrupted line of Supreme Court cases finding vague and ambiguous laws to be a deprivation of basic due process. If Indiana requires National Salvage to have a permit, and if failure to have one is punishable by ruinous civil and criminal penalties, then due process requires Indiana to be clear in the imposition of its requirement. The failure to provide fair warning to National Salvage and similarly situated businesses is grounds for certiorari and for reversal of the decision below.

REASONS FOR GRANTING THE WRIT

I.

Indiana's "transfer station" permit requirement as applied to shipments of solid waste transported by rail interferes with waste shipments originating from out-of-state and is in violation of the Commerce Clause.

Since at least 1978, when the Supreme Court decided Philadelphia v. New Jersey, 437 U.S. 617 (1978), it has been clear in this nation that the "dormant" aspect of the Commerce Clause forbids states from advancing their own commercial interest by curtailing the movement of waste into a state. In Fort Gratiot Landfill, Inc. v. Michigan Department of Natural Resources, ___ U.S. ___, 112 S.Ct. 2019 (1992), the Supreme Court reaffirmed this holding and further held that a Michigan law permitting counties to exclude out-of-county waste from in-county landfills was prohibited by the Commerce Clause. Michigan had argued,

among other things, that permitting counties to discriminate against out-of-county waste was inoffensive because such discrimination applied equally to out-of-county waste from Michigan as well as from other states. The argument was rejected. This Court held that the fact that Michigan's waste restrictions discriminated against some Michigan waste producers, and that some Michigan counties allowed out-of-state waste, did not mitigate the burden of the restrictions on interstate commerce. Absent evidence that imported waste raised legitimate concerns not presented by Michigan waste, the discriminatory waste restrictions could not stand.

This case is a variation of the Fort Gratiot theme. Here, Indiana has held that no one may unload non-hazardous baled solid waste from railcars to trucks without an IDEM permit. The Indiana court of appeals called this permit requirement "evenhanded"

since persons unloading intrastate rail waste shipments also must have a permit. Appeals Op., 571 N.E.2d at 560. The evidence at trial, however, established that only out-of-state waste moves through Indiana by rail. Indeed, because rail shipping of solid waste is only economically feasible over very long distances, only out-of-state waste will ever move by rail in Indiana. Thus, the practical effect of Indiana's permit requirement is to burden a mode of waste shipment that is uniquely interstate in character.

Moreover, the evidence showed that Indiana's purpose in imposing a permit requirement on National Salvage was to block out-of-state waste. IDEM sought to destroy National Salvage's business. IDEM presented no evidence that municipal solid waste from out-of-state is any worse or different from waste generated in Indiana.

National Salvage showed that before IDEM told National Salvage that it needed a permit for unloading waste, IDEM's inspectors visited National Salvage to find out whether the waste being off-loaded came from outside Indiana. Further, days before IDEM filed suit, the Indiana governor was quoted in the Indianapolis Star and elsewhere as ordering IDEM to take whatever action was necessary to "get this out-of-state garbage where it belongs -- out-of-state." Two weeks after bringing suit and just six days before trial, the state announced it was "cracking down" against trains and motor carriers carrying municipal solid waste into Indiana.

All this evidence of Indiana's discriminatory purpose, unrebutted by IDEM, was disregarded by the trial court. The Indiana court of appeals held that the failure to consider the Commerce Clause in

this case was at most "harmless" error. Appeals Op., 571 N.E.2d at 561.

This was not harmless error. The evidence showing Indiana's unlawful purpose in shutting down National Salvage is compelling. National Salvage introduced in evidence a copy of Executive Order 89-17 issued by the Office of the Governor on November 9, 1989.[11] The official declaration of Indiana's "crackdown" on out-of-state waste, the Order noted "rapid changes" in "shipping patterns and competition" in the solid waste industry and stated that "Indiana's laws and regulations governing the transportation, processing and disposal of solid waste cannot effectively protect the public in the face of these rapid changes in the solid waste handling and disposal industry." The Order stated:

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[11]Executive Order 89-17 is reproduced in the appendix, infra.

> "The limited capacity of Indiana's existing landfills, the rapid changes in the solid waste handling and disposal industry, and the defects in Indiana's existing laws and regulations governing the transportation, processing and disposal of solid waste require a comprehensive review of Indiana's laws regulating solid waste and Indiana's plans for managing its solid waste for years to come...."

It is difficult to imagine a more candid admission, two weeks after this lawsuit was filed, that IDEM's purpose in shutting down National Salvage was to block waste originating from out-of-state from reaching Indiana landfills. There could hardly be a clearer admission that IDEM's existing rules actually did not address or require permits for unloading operations like National Salvage.

This evidence of IDEM's unlawful purpose is relevant in evaluating IDEM's asserted reason for requiring National Salvage to obtain a permit. IDEM argued

below that it sought to protect the public health and safety, yet IDEM offered no evidence that solid waste from outside Indiana was different or more harmful than waste generated in Indiana, or that a hypothetical facility like National Salvage handling solely intrastate waste would ever be required to obtain any permit. IDEM's former assistant commissioner who helped draft IDEM's solid waste rules, David Lamm, testified that a "transfer station" in Indiana is "generally a facility where municipal solid waste comes in a number of vehicles and is compacted into a larger vehicle for transport over a longer distance to a solid waste landfill or incinerator." Lamm Testimony, November 15, 1989 Trial Transcript, p. 147. Mr. Lamm testified that National Salvage's unloading of solid waste from railcars to trucks, without compacting the waste or "processing" it in any way, involved mere

movement of waste to a smaller vehicle and would not constitute a transfer station. Lamm Testimony, Trial Transcript, p. 147-50. IDEM agreed with this. In a footnote in its Appellee's Brief, IDEM stated that:

> "Transfer station" is defined by 329 IAC 2-2-1(b) as a facility "at which solid waste in solid waste in [sic] transferred into larger capacity vehicles." In practice, a transfer station receives the waste from collection routes and is loaded on larger trucks for the next trip to a landfill.

Appellee's Brief, p. 13, n. 1 (emphasis supplied). IDEM also stated: "Certainly, National Salvage was not operating an incinerator, transfer station, solid waste baler or shredder, etc." Appellee's Brief, p. 13. The assertion that IDEM required National Salvage to obtain a permit to protect the public is simply a pretext. The only purpose and effect of Indiana's discriminatory permit requirement is to

keep waste from out-of-state from reaching Indiana landfills.

Had IDEM truly wanted to protect the public and environment, and not simply stop the importation of solid waste into Indiana, IDEM had available many enforcement options. IDEM could have issued orders to National Salvage to abate any perceived pollution problem. It could have sued National Salvage to collect civil penalties for disobedience of such orders. It could have required special railcar liners or imposed other conditions to ensure that no waste would ever be released by National Salvage anywhere in the environment. Instead of pursuing those options, IDEM enjoined National Salvage from operating altogether. IDEM destroyed a lawful and valuable enterprise. The evidence at trial showed this, yet Indiana has permitted this patent interference with interstate commerce to stand.

If the Commerce Clause is to have meaning in Indiana, Indiana's protectionist permit requirement for unloading non-hazardous solid waste transported by rail should be recognized for what it is and struck down.

Indiana's disregard of the Commerce Clause and of this Court's interstate commerce decisions has not escaped judicial attention. In December 1990, while National Salvage appealed to the Indiana court of appeals, the United States district court for the southern district of Indiana issued a ruling in another case confirming that Indiana has sought to interfere with the interstate transportation of solid waste. In Government Suppliers Consolidating Services, Inc. v. Indiana, 753 F.Supp. 739 (S.D. Ind. 1990), the court struck down as an infringement on the Commerce Clause portions of a year-old Indiana statute that

required transporters of solid waste to certify where out-of-state waste came from and imposed extra charges on such waste. The district court noted speeches by the Indiana governor requesting legislation to stop "the tidal wave of out-of-state trash" allegedly threatening the state, as well as published statements by IDEM's commissioner concerning the "recently accelerated influx of out-of-state waste into Indiana" and warning that "[w]e cannot allow Indiana to become the dumping ground for the nation's garbage." 753 F.Supp. at 746. Those statements, among other factors, convinced the court that Indiana officials responsible for setting the state's solid waste policy shared "an objective of limiting, or perhaps eliminating, the

deposition of out-of-state trash in Indiana." 753 F.Supp. at 767.[12]

By enjoining National Salvage from operating and imposing an IDEM permit requirement on anyone who off-loads solid waste from railcars onto trucks, Indiana seeks to "isolate itself from the national economy," __ U.S. at ___, 112 S.Ct. at 2020, just as New Jersey tried to do in excluding out-of-state waste and as Michigan sought to permit its counties to do under the Michigan statute in Fort

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[12]National Salvage does not contend that illegitimate motives vel non are dispositive in the Commerce Clause analysis. In this case the evidence showed both improper motives and a substantial adverse impact on interstate commerce. In weighing whether the state's asserted purpose is an impermissible burden on interstate commerce, the Court may be forced to consider interests that are incommensurate, see, e.g., Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 896, 108 S.Ct. 2218, 2223-24 (Scalia, J., concurring), and National Salvage respectfully suggests that evidence that the state's asserted motive is pretextual is relevant in such circumstances and should be examined.

Gratiot. The fact that out-of-state waste is blocked from Indiana by a superficially neutral permit requirement rather than an outright prohibition is of no moment. As Fort Gratiot instructs, "[N]either the fact that the Michigan statute purports to regulate intercounty commerce in waste nor the fact that some Michigan counties accept out-of-state waste provides an adequate basis for distinguishing this case from Philadelphia v. New Jersey." Fort Gratiot, __ U.S. at __, 112 S.Ct. at 2025. The same reasoning applies here. It does not matter that Indiana's permit requirement on its face applies to intrastate rail shipments of waste. In practical operation, the Indiana permit requirement is a protectionist measure that excludes and uniquely discriminates against interstate waste shipments. The requirement should be stricken because there is no legitimate justification for IDEM's attempt to block

solid waste importation by National Salvage.

The court of appeals noted that Indiana long has imposed a permit requirement on transfer stations handling local waste, and nothing in the law requires a special exemption for transfer stations handling waste from out-of-state. 571 N.E.2d at 560. This misses the point. The reason transfer stations have been required to have permits as "solid waste processing facilities," as the evidence at the trial showed, is because a true transfer station, as defined in 329 IAC 2-2-1(b)(58) and as understood in the waste management industry, is a place where waste gets "processed" -- that is, where the waste is compacted, baled, containerized, or otherwise made ready for loading onto larger vehicles for long-distance transport to a landfill or waste incinerator. No waste processing occurred at National

Salvage. National Salvage simply moved baled waste by forklift from railcars to trucks. The waste was not compacted, compressed or changed in any way. It was never stored to accumulate enough waste to fill the trucks. The bales never even touched the ground. The definition of "processing" at 329 IAC 2-2-1(b)(41) expressly excludes the transportation of solid waste. All of National Salvage's activities were a form of waste transportation.

Even if the Indiana permit requirement could be construed as impairing interstate and intrastate commerce equally (which is not the case), and only minimal scrutiny were required, the permit requirement still could not withstand scrutiny. That is because Supreme Court cases dealing with local rules that are nondiscriminatory on their face still require that the rule (1) effectuate a legitimate local public

interest, (2) have only an incidental effect on interstate commerce, and (3) not burden commerce excessively in relation to the local benefits. Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 877 (1970); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443, 80 S.Ct. 813, 815-16 (1960). There was no evidence presented, nor could any be developed, that any local public interest is served by stretching Indiana's solid waste rules past the breaking point to block National Salvage from operating. No evidence was introduced by IDEM below that solid waste off-loaded by National Salvage presented public health or environmental problems that are not presented by Indiana waste. Only out-of-state waste is affected by imposing IDEM's permit requirement. That exclusive, not incidental, burden by any objective measure is excessive in relation

to whatever de minimis local benefits may be achieved.

Indiana is not the only state developing new ways to manage its solid waste disposal requirements. Banning out-of-state waste solely because it originates out-of-state is never a permissible option. Unfortunately, Indiana in this case has overlooked the Commerce Clause in seeking an expedient solution to a perceived waste disposal problem. By granting the writ of certiorari, this Court can demonstrate once again the important limits imposed by the Commerce Clause on the power of states to regulate interstate solid waste shipments.

II.

Indiana's "transfer station" permit requirement as applied to National Salvage is impermissibly vague and violates the Due Process Clause.

Fair notice of what the State commands or forbids is the first essential of due

process. This teaching has been central in this Court's due process decisions for generations. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), Lanzetta v. New Jersey, 306 U.S. 451 (1939), Connally v. General Construction Co., 269 U.S. 385, 391 (1926), Cline v. Frink Dairy Co., 274 U.S. 445 (1927). Vague laws are repugnant to due process because they do not give fair warning of proscribed conduct. This is especially true of penal statutes. It is also true of non-penal statutes implicating important rights and interests. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Indiana's after-the-fact judgment based on a new Indiana statute that National Salvage is a "transfer station," despite the IDEM rule's express statement and IDEM's prior determination that National Salvage was not one, is a classic

due process violation. If it takes the Indiana court of appeals a year and a half to decide that a permit is required, based on a statute enacted after this case was filed that "clarified" IDEM's intent in a way precisely the opposite of what IDEM's rule said, how did National Salvage have fair warning -- especially when IDEM confirmed to Curtis Schopp of National Salvage and at least two other businessmen, before the political winds changed, that no permit was required? This lawsuit exposed National Salvage to civil penalties of $25,000.00 per day per violation -- potentially hundreds of thousands of dollars. Under Ind. Code 13-7-13-3, IDEM could have sought criminal penalties on top of the civil sanctions. There is virtually no mens rea requirement for a criminal violation. A mere negligent violation of an IDEM rule is sufficient to sustain

criminal penalties under Ind. Code 13-7-13-3.

The Indiana court of appeals attempted to avoid the due process implications of this case by concluding that IDEM's rules were "economic regulations" that did not require crystal clarity to survive a vagueness challenge. Appeals Op., 571 N.E.2d at 555. This is wrong. IDEM's rules, like environmental laws prevailing throughout the nation, are penal. In Executive Order 89-17, the Office of the Governor expressly warned that civil and criminal penalties were available for violations of IDEM's rules. To this day, National Salvage remains exposed to the possibility of criminal sanctions under Ind. Code 13-7-13-3.

In sum, this case is not like Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), which involved the regulation of a "head shop" by

a village ordinance for which violations were punishable by fines of $10 to $500. That case involved a facial attack on the ordinance, not an "as applied" challenge like this one. The Supreme Court held there that a more relaxed vagueness standard applies to such economic regulations since regulated entities may be able to clarify the meaning of a regulation through inquiry or by resort to an administrative process. Also, the Court noted that a scienter requirement in the statute may mitigate against a law's vagueness.

Each of those factors cuts against upholding Indiana's application of a permit requirement to National Salvage. National Salvage did investigate the Indiana solid waste rules, including the definition of "transfer station," prior to beginning operations. It did confer with IDEM (as did a number of other individuals) and was

advised that no permit was needed for unloading waste from railcars to trucks. There is nothing else National Salvage could have done under Indiana law to discover IDEM's interpretation of one of its own rules. The ruinous fines sought by IDEM far exceeded the sanction at stake in Hoffman Estates. Further, IDEM's rules require no scienter element to impose such enormous penalties. Violations are strict liability offenses. A mere negligent violation of IDEM's rules is punishable as a Class D felony under Ind. Code 13-7-13-3, for which Indiana makes available a five year prison term.

In evaluating vagueness claims, the degree of definiteness required to satisfy due process should take into account the common understanding and commercial knowledge of the group of persons with a specialized understanding of the subject being regulated. Fleming v. United States

Department of Agriculture, 713 F.2d 179, 184 (6th Cir. 1983); Bass Plating Co. v. Town of Windsore, 639 F.Supp. 873, 880 (1986). The evidence at trial showed that the regulated community in Indiana understood "transfer station" to mean just what IDEM's rule said -- a facility where waste is transferred into larger capacity vehicles or containers for further transportation. No one but the Indiana court of appeals ever even suggested that when this case was decided "transfer station" meant anything else. In construing "transfer station" to mean a transfer of waste from any container or vehicle into another container or vehicle for transportation, the court of appeals may have opened the door to IDEM permit requirements for many containers and facilities that heretofore have been unregulated. This is a radical change in the law, not a "clarification" as the court

of appeals insisted. However Indiana ultimately defines the term "transfer station," Indiana may not, consistent with due process, apply the new definition retroactively to National Salvage. The Supreme Court repeatedly has pointed out that "the views of a subsequent [Legislature] form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304 (1960); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Waterman Steamship Corp. v. United States, 381 U.S. 252 (1965). This case illustrates one reason why this is so. If Indiana's courts must rely on a new statute to construe the old law under which National Salvage was enjoined, then the law plainly fails to give fair notice of what conduct is proscribed.

National Salvage does not contend that it is exempt from Indiana's environmental

rules and statutes. National Salvage simply is not a "transfer station" or a "solid waste processing facility" under IDEM's rules and is not subject to any IDEM permit requirement. Had National Salvage been permitted to operate, it could not and would not have had any special freedom to pollute the environment. It was still subject to all statutory proscriptions against any contamination. All those requirements would adequately protect the environment.

III.

The court of appeals erred because it affirmed the injunction issued against National Salvage without any finding or showing of irreparable injury, inadequacy of a remedy at law, or that a balance of all the equities favored an injunction

This case also raises a fundamental question regarding the limitations imposed by equity and due process on a court's

power to destroy a business because of alleged statutory violations. The trial court enjoined National Salvage from operating without any assessment of whether National Salvage's continued operation would cause irreparable or even any significant environmental injury; without considering whether that injury could be cured or avoided; without considering the harm of closure upon National Salvage and whether such harm exceeded any harm to IDEM or the environment; without assessing the effect of an injunction on the status quo; or indeed without weighing any of the factors a court must weigh when faced with a request for injunctive relief.

The extraordinary nature of injunctive relief requires a careful application of equitable principles and an explicit weighing of comparative injuries to the parties and to the public. Courts of equity should not issue injunctions where

there exists an adequate remedy at law, such as damages, civil penalties, criminal sanctions or administrative procedures. Beacon Theaters, Inc. v. Westover (1959), 359 U.S. 500, 506-07, 79 S.Ct. 948, 954; Weinberger v. Romero-Barcelo (1982), 456 U.S. 305, 311-313, 102 S.Ct. 1798. This Court repeatedly has held -- in cases alleging violations of environmental statutes -- that in considering whether to issue an injunction the interests of the plaintiff, the defendant and the public should be considered. See, e.g., Amoco Production Co. v. Gambell (1987), 480 U.S. 531, 545-546, 107 S.Ct. 1396; Weinberger v. Romero-Barcelo, 456 U.S. at 311-313; State of Wisconsin v. Weinberger (1984), 7th Cir., 745 F.2d 412, 424.

This is more than a requirement of equity. The obligation of the state to make a threshold showing of injury that cannot be remedied at law is a requirement

of due process under the Fourteenth Amendment. This Court has held that the constitutional right to be heard is a basic aspect of the duty of government to follow a fair decision making process when it acts to deprive a person of property. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 80-81, 92 S.Ct. 1983 (1972); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975). The hearing cannot be an empty one. The state must make some threshold showing of injury before a substantial property right can be impaired, especially when the state seeks to destroy property and not merely restrain it. In this case, Indiana's injunction destroyed National Salvage. The injunction prevented National Salvage from operating at all. IDEM's position is that it was entitled to this relief upon a showing of a statutory violation, however insubstantial, without evidence of a public health or

environmental harm or indeed any imminent, substantial injury that could not be remedied in some fashion less drastic than the outright destruction of National Salvage's business. This eviscerates the utility of providing National Salvage any hearing at all.

IDEM itself recognized the applicable standard in its complaint. Paragraph 1 stated IDEM's authority to bring an action "to seek injunctive relief to remedy immediate and irreparable harm and the imminent and substantial endangerment to health and the environment." Paragraph 3 stated this action was brought pursuant to Ind. Code 13-7-5-7 and 13-7-12-2. The first statute says nothing about injunctive relief, although the statute does authorize IDEM's commissioner, by "appropriate action" to "procure or secure compliance" with the law. Ind. Code 13-7-12-2 directs the commissioner to seek an injunction

against any pollution source which presents an "imminent and substantial endangerment" to the health or livelihood of persons. IDEM did not prove such "imminent or substantial endangerment." IDEM neither performed nor presented tests or analyses to establish the existence of any endangerment at all to the public from National Salvage's operation. IDEM failed to present evidence of <u>any</u> injury, much less an irreparable one, sufficient to support an injunction.

The statutes IDEM relied upon, by requiring "imminent and substantial endangerment" or "appropriate action," effectively expressly state a requirement that no injunction should issue absent a balancing of equities and weighing of interests, with due consideration for the adequacy of other remedies. Ind. Code 13-7-12-2's requirement of an "imminent and substantial endangerment" would be

completely superfluous if Ind. Code 13-7-5-7 is read to simply require merely any violation of any environmental statute.

Older cases sometimes cited for the proposition that a violation of law eliminates the need to show irreparable injury are easily distinguished from this case and have been superseded by environmental injunction cases like Amoco Products and Romero-Barcelo, which involved federal laws that are remarkably similar to the Indiana statutes under which IDEM brought this lawsuit. In Romero-Barcelo and Amoco this Court held that unless there is a manifest legislative intent that traditional equitable discretion not be exercised, courts must continue to weigh those factors. Romero-Barcelo, 456 S.Ct. at 313, Amoco, 480 U.S. at 542-545. Like the federal statutes in Romero-Barcelo and Amoco, the two statutes under which IDEM sued National Salvage do not manifest any

such intent. To the contrary, they expressly require a finding of "imminent and substantial endangerment" to support an injunction, or require "appropriate" action.

Romero-Barcelo is especially instructive. In that case the Supreme Court affirmed that the Navy must seek a water pollution permit for gunnery range activities but refused to enjoin the Navy from continuing its gunnery training while the permit application was pending where the balance of harm did not require cessation. The Supreme Court reasoned that the very existence of a permitting program implicitly recognizes a balancing approach to evaluating requests for injunctive relief. The statute in Romero contained language remarkably similar to the two statutes IDEM relied on here, authorizing an immediate injunction to permit "imminent and substantial endangerment" and actions

"for appropriate relief, including a permanent or temporary injunction," for other violations (emphasis added). The parallels to Ind. Code 13-7-12-2 and 13-7-5-7 are striking. The Supreme Court decided that this statutory structure and language did not permit a court to refuse to consider traditional equitable factors.

The evidence at trial showed that National Salvage would suffer very great, perhaps irreparable injury and loss if enjoined from operating due to the many commitments it made in reliance upon IDEM's construction of its rules. The court below made no finding and IDEM did not present any evidence that IDEM or the environment (1) would suffer irreparable harm, (2) lacked an adequate remedy at law, (3) that the balance of interests (National Salvage's, IDEM's and the public's) favored entry of an injunction, or (4) that an injunction would preserve the status quo.

The failure to consider if an adequate remedy existed at law, or if some remedy other than immediate closure was adequate, was especially egregious. There was no evidence that the off-loading could not be operated in an environmentally suitable way (and overwhelming evidence that it could and would be operated in that fashion) while National Salvage sought a permit.

No recent federal environmental appellate case has failed to follow the trend of decisions in favor of weighing equitable considerations before enjoining the operations of a lawful business. See, e.g., National Resources Defense Council, Inc. v. Outboard Marine Corp., 692 F.Supp. 801 (N.D. Ill. 1988); Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9th Cir. 1988); Town of Huntington v. Marsh, 884 F.2d 648 (2d Cir. 1989); Commonwealth of

Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).[13]

The courts below never gave due consideration to the possibility of mitigation of any risk or any of the other factors essential to consideration of whether a preliminary injunction should be issued. The failure to consider (1) the lack of any irreparable injury to IDEM or

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[13]The Indiana court of appeals miscited dicta from the Seventh Circuit's opinion in United States v. Environmental Waste Control, Inc., 917 F.2d 327, 332 (7th Cir. 1990), which states that injunctive relief may be issued in favor of a governmental plaintiff in an environmental case without a balancing of the equities. See Appeals Op., 571 N.E.2d at 559. The portion of the Environmental Waste decision quoted by the Court of Appeals actually came from a 1983 Fourth Circuit decision, which in turn relied on a Seventh Circuit opinion ultimately reversed by the United States Supreme Court. In any event, the Seventh Circuit held that the district court "went to great pains" to give reasons for issuing permanent injunctive relief and "thoroughly and correctly" balanced the competing equities. 917 F.2d at 332. "[I]t is clear that the district court specifically undertook to balance the benefit to the public against the harm to the public in this case." Id.

the environment, (2) the great harm to National Salvage, (3) the absence of any imminent or substantial threat to the public or to anyone, (4) the ease with which any problems could be corrected, as well as the possible use of less drastic relief, (5) the inequity of immediately putting National Salvage out of business after it constructed its operations in reliance on IDEM's advice, or (6) the fact that a closure injunction would destroy the status quo, all are serious errors requiring reversal of the court's injunction.

Conclusion

This case presents this Court with the opportunity to clarify, again, that the great principles of due process and the limitations on state power imposed by the Commerce Clause are applicable to environmental law. National Salvage prays that this petition for a writ of certiorari

to the Indiana supreme court be granted and that this Court review and reverse the imposition of an injunction upon National Salvage.

Respectfully Submitted,

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August 3, 1992

APPENDIX

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CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT
DWAYNE M. BROWN, CLERK

CAUSE NO. 49A04-8912-CV-00554
LOWER CAUSE 49C018910MI3752

NATIONAL SALVAGE & SERVICE CORP.,

Appellant,

vs.

COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Appellee.

You are hereby notified that the Supreme Court has on this day 3/05/92 APPELLANT'S CORRECTED PETITION FOR TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE. DEBRULER, GIVAN, AND KRAHULIK, JJ., VOTE TO DENY TRANSFER. SHEPARD, C.J., AND DICKSON, J., VOTE TO GRANT TRANSFER.

WITNESS my name and the seal of said Court this 5th day of March, 1992.

_____
Clerk, Supreme Court, Court of Appeals and Tax Court

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IN THE
COURT OF APPEALS OF INDIANA
FOURTH DISTRICT
No. 49A04-8912-CV-554

NATIONAL SALVAGE & SERVICE CORPORATION,

Appellant
(Defendant Below),

v.

COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Appellee
(Plaintiff Below).

APPEAL FROM THE MARION CIRCUIT COURT
The Honorable John M. Ryan, Judge
Cause No. 49C01-8910-M13752

MILLER, J.

National Salvage (Salvage) leased a warehouse in an Indianapolis industrial park in order to transfer, under contract, bailed solid municipal waste (all from out of state) from railroad cars through its warehouse onto trucks, which then took the waste to a landfill in Boone County, Indiana. The railroad cars contained large amounts of waste and often were not unloaded for several days. Salvage never obtained a solid waste permit from the Indiana Department of Environmental Management (Department). On October 27, 1989, the Department filed a complaint in the Marion Circuit Court, seeking a preliminary and permanent injunction against Salvage's operation. Salvage appeals the November 16, 1989, granting of a preliminary injunction against it, raising six issues which we rephrase as

follows:

I. Whether Salvage's warehouse, served by a railroad spur which receives boxcars containing municipal waste, is a facility for which a solid waste facility permit is required.

II. Whether construing the statutes and regulations to require Salvage to obtain a permit makes these laws unconstitutionally vague.

III. Whether the Department was estopped from requiring a permit due to an unwitnessed and unmemorialized meeting between a Salvage officer and a Department employee, at which the Salvage representative was allegedly told no permit was required.

IV. Whether the Department met the requirements for injunctive relief without a balancing of the equities and without a showing of irreparable harm, but on a showing of Salvage's violation of the statutory and regulatory schemes.

V. Whether the trial court erred because it did not consider or find that the Department's efforts to block Salvage's off-loading operation by requiring a permit violated the Commerce Clause of the United States Constitution.

VI. Whether the Department's

regulatory requirements are preempted by federal law and whether the trial court lacked subject matter jurisdiction.

We affirm.

FACTS

The facts most favorable to the trial court's decision reveal that on October 23, 1989, the Commissioner of the Department, Kathy Prosser, sent investigator Robert Cline to Salvage's warehouse. Mr. Cline observed five railroad boxcars sitting at Salvage's warehouse siding. The door was ajar on one boxcar and he observed garbage in it. Cline observed some of the cars emitting some sort of liquid and strong odors. He said it smelled like a dump. Flies were also present. The boxcars were still present the following day.

Before the issuance of a Temporary Restraining Order on October 27, 1989, Salvage had actually received at

least twelve waste-filled boxcars at the warehouse between October 13 and 19. Only one of these cars was unloaded the same day it arrived. Most of the cars remained at least two days and, in some cases, cars remained on the tracks alongside Salvage's premises for three days. The boxcars held between 70-95 tons of municipal waste each.

In February, 1989, Curtis Schopp, vice-president of Salvage, met with C. Steven Poe, Chief of the Facility Inspection Section of the Department for Southern Indiana, to whom a receptionist had referred Schopp in response to Schopp's statement that he had a solid waste question. No one under the deputy commissioner level at the Department has authority to make decisions regarding permits. Schopp testified that, in this unwitnessed unmemorialized impromptu meeting, he explained the details of the proposed operation without the benefit of

plans or diagrams. Schopp alleges that Poe orally informed him that no permit would be required for the operation Schopp outlined. Schopp claims that they proceeded with their plans for the boxcar unloading operation in reliance upon this conversation.

In order to support Mr. Schopp's claim, Salvage called two witness, Mr. Tucker Lamkin and Mr. John Miller, who were interested in starting businesses similar to Salvage's. In April and again in May, Mr. Lamkin and Mr. Miller also inquired of the Department concerning a similar use of boxcars. Although Mr. Miller and Mr. Lamkin believed it was Mr. Poe's opinion that their projects would not require a permit, their projects did not proceed. There is no evidence that Schopp, Miller or Lamkin had any contemporaneous knowledge of each other's conversations with the Department.

In meetings with the Indiana Railroad Company in June of 1989, Christa Russell, Mr. Poe's superior, told it permits were required for "off-loading" facilities. Ms. Russell also told this to a representative of a company called Crossbridge which owned some of the cars which were present at Salvage when the site was investigated on October 23, 1989. The record does not indicate whether Crossbridge communicated this to Salvage.

Additional facts will be added as necessary. The trial court made the following Findings of Fact and Conclusions of Law:

> 1. The Indiana Department of Environmental Management (hereinafter referred to as Department) is an administrative agency of the State of Indiana which is organized, established and existing by virtue of IC 13-7-2-11.
>
> 2. The Environmental Management Act, IC 13-7-5-7, authorizes court actions by the Commissioner of the Indiana Department of

Environmental Management Act to seek injunctive relief to procure compliance with said Act.

3. The defendant is an Indiana corporation and was incorporated on January 13, 1988.

4. On or about July 31, 1989 the defendant entered into a lease of the premises referred to as 1931 Stout Field Drive in Indianapolis, Indiana.

5. Prior to this in June the defendant had placed an ad in a trade publication for the receipt and disposable [sic] of both loose and solid waste.

6. Curtis Schopp, the vice-president of National Salvage had visited the offices of the Department sometime in February, 1989 prior to the commencement of operations. He had gone to the Department to inquire about both the disposal of special and solid waste. While there he had a visit with a Mr. Poe and testified that he explained the operation to Poe and was informed orally that no permit was required. No written confirmation of this was ever obtained.

7. National Salvage places great reliance on this oral opinion.

8. The leased premises is served by a railroad spur line

and facing the railroad tracks on one wall are two doors [through] which the contents of a railroad car may be brought into the building. There is no permitted landfill or other disposal facility at these premises.

9. On or about August 9, 1989 the defendant entered into an agreement under which it would dump waste material at the Northside Landfill in Boone County.

10. On or about September. 8, 1989 the defendant entered into a lease for three Dorsey "open top/walking floor" trailers.

11. On or about October 6, 1989 the defendant entered into a master lease agreement for three Mack trucks.

12. On or about October 11, 1989 the defendant entered into a lease for up to 120 60-foot boxcars numbered NSSX 5000 through NSSX 5119.

13. Between the dates of October 13, 1989 and October 19, 1989 at least twelve (12) railroad boxcars were placed at the defendant's leased premises, solid waste was unloaded into defendant's building and put into truck trailers. Once placed on the abutting siding the railroad cars waited from one to three days for unloading.

14. Each of these railroad boxcars contained baled municipal solid waste.

15. The basic business of the defendant was to transfer bales of solid waste from the railroad cars to their warehouse. Such waste would then be loaded on trucks to be taken to the Northside Landfill. It would take about three and one half truck loads of material to unload one railroad car.

16. Operation would be accomplished by bringing the railroad car to the side of the building where forklift trucks would unload it into the warehouse and then would place it in trucks for transport to the landfill.

17. Defendant also has an agreement with Star Recycling Company under which the defendant would receive unrecyclable material from Star Recycling. This material included what is commonly known as garbage.

18. On October 23, 1989 five (5) railroad boxcars loaded with solid waste were observed at the defendant's facility. Some of these cars were observed emitting a liquid of some sort.

19. Railroad boxcars originating from Star Recycling and on which the NSSX registration numbers were visible were observed on

October 27, 1989 on a railroad siding between Minnesota Street and Airport Expressway next to the Bridgeport Brass Company. Again it was observed that each of these cars were emitting some sort of a liquid.

20. No test was ever performed on the liquid coming from said boxcars.

21. The plaintiff has never issued a solid waste facility permit of any kind for defendant's operations at 1931 Stout Field Drive.

22. The question presented is whether this type of operation requires the issuance of a permit by the Department under existing statutes and regulations.

23. The statutory requirements include IC 13-7-4-1(6) and IC 13-7-1-22 which provide in part as follows:

24. IC 13-7-4-1(6) provides as follows:

Sec. 1. No person may do any of the following:

(1) Discharge, emit, cause, allow, or threaten to discharge, emit, cause, or allow any contaminant or waste including any noxious odor, either alone or in combination with contaminants from other sources, into the environment or into any publicly

owned treatment works in any form which causes or would cause pollution which violates or would violate rules standards, or discharge or emission requirements adopted by the appropriate board pursuant to this article.

* * *

(3) Deposit any contaminants upon the land in such place and manner which creates, or which would create, a pollution hazard that violates or would violate a rule adopted by one of the contaminants or solid waste upon the land except through the use of sanitary landfills, incineration, composting, garbage grinding, or another method acceptable to the solid waste management board.

(4) Dump, cause, or allow the open dumping of garbage or of any other solid waste in violation of rules adopted by the solid waste management board.

* * *

(6) Construct, install, operate, conduct, or modify, without prior approval of the department, any equipment or facility of any type which may cause or contribute to pollution or which may be designed to prevent pollution. However, the commissioner or the appropriate board may approve experimental uses of equipment,

facility, or pollution control device as is deemed necessary for the further development of the state of the art of pollution control.

25. IC 13-7-1-22 provides as follows:

> "Solid waste" means any garbage, refuse, sludge from a waste treatment plant, sludge from a water supply treatment plant, sludge from an air pollution control facility, or other discarded material, including solid, liquid, semisolid, or commercial, mining, or agricultural operations or from community activities.

26. Pertinent regulations include 329 IAC 2-2-1(a)(53), 329 IAC 2-2-1(a)(41) and 329 IAC 2-3-1(6) the latter [sic] containing the only relevant exclusion of regulation in this matter and such regulations are as follows:

27. 329 IAC 2-2-1(a)(53) defines the term "solid waste facility" as used above, as follows:

> (53) "Solid waste facility" or "facility" means all contiguous land and structures, other appurtenances, and improvements on the land, used for processing, storing in conjunction with processing or disposal, or

disposing of solid waste, and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations thereof.

28. 329 IAC 2-2-1(a)(41) defines the term "processing" as used above, as follows:

> (41) "Processing" means the method, system, or other handling of solid waste so as to change its chemical, biological, or physical form or to render it more amenable for disposal or recovery of materials or energy, or the transfer of solid waste materials but excluding the transportation of solid waste.

29. 329 IAC 2-3-1(6) contains the only relevant exclusion to regulation in this matter and provides as follows:

> The following solid waste management activities are not subject to the provisions of this article: (6) Processing, except for incineration, of solid waste which takes place at the generating facility.

CONCLUSIONS OF LAW

1. Actions based on oral

representations, without written confirmation and approval, are open to conflicting interpretations and the authority of those making such statements. Placing full reliance on such oral expressions is to say the least hazardous and it is a practice which is not to be condoned.

2. The defendant's building an operation at 1931 Stout Field Drive constitutes a solid waste facility, as defined, because it is used for processing or storing. In conjunction with processing of solid waste by virtue of the handling of baled waste and the storing of such waste in railroad boxcars pending unloading and transfer to trucks for the transportation to a disposal site.

3. The defendant's operation constitutes processing of solid waste because a) it is the handling of solid waste so as to change its physical form, b) it renders the waste more amenable to disposal by virtue of reducing its mass, and c) it is a transfer of solid waste material from one container to another away from the point of generation.

4. The delivery, and acceptance, unloading, and transfer of solid waste at the defendant's facility thus constitutes a violation of the applicable statute and

regulations.

5. While a civil penalty may be imposed the uncontroverted evidence that reliance was placed on the oral representations of Mr. Poe is a mitigating circumstance and no civil penalty is therefore imposed.

6. The plaintiff is however entitled to injunctive relief under the facts of this case and the injunction is therefore granted.

7. The law is with the plaintiff and against the defendant and operations of this type must receive a permit from the Department.

(R.78-83).

DECISION

Issue I - Permit Requirement

Salvage argues that no law or rule requires it to get a permit from the Department for off-loading baled municipal waste from railroad box cars to a warehouse and then immediately into trucks. Salvage also argues that if the current laws or rules are so construed, the law or rule is unconstitutionally vague. We disagree with

these contentions.

Indiana Code 13-7-4-1 requires any facility which may cause pollution to get prior approval from the Department. I.C. 13-7-4-1 provides in pertinent part as follows:

"Sec. 1. No person may do any of the following:

* * *

> (6) Construct, install, operate, conduct, or modify, without prior approval of the department, any equipment or facility of any type which may cause or contribute to pollution or which may be designed to prevent pollution. However, the commissioner or the appropriate board may approve experimental uses of equipment, facility, or pollution control device as is deemed necessary for the further development of the state of the art of pollution control."

(emphasis added.)

Salvage argues that this broad prohibition is the only authority which might possibly cover its activities and that this authority is unconstitutionally

vague. This is incorrect. I.C. 3-7-10-1 gives rule-making authority to the Solid Waste Management Board (Board) and defines the scope of that authority. The Board has promulgated specific regulations which require operations such as Salvage's to obtain permits.

The Board's implementing rule, 329 IAC 2-8-1, states that solid waste permits are required for any person who disposes of solid waste or who operates a solid waste processing facility. In order to determine if Salvage is required to get a permit under the rule, we must look at the definitions section - 329 IAC 2-2-1 - to ascertain whether Salvage disposes of solid waste or operates a solid waste processing facility.

Neither party contends that Salvage comes under the definition of "Solid waste land disposal facility" - 329 IAC 2-2-1(54). The question is whether,

under 329 IAC 2-2-1, Salvage can be termed as a solid waste processing facility. The trial court found the applicable definitions in 329 IAC 2-2-1 to be as follows:

> "(53) 'Solid waste facility' or 'facility' means all contiguous land and structures, other appurtenances, and improvements of the land, used for processing, storing in conjunction with processing or disposal operational units, e.g., one (1) or more landfills, surface impoundments, or combinations thereof."
>
> "(41) 'Processing' means the method, system, or other handling of solid waste so as to change its chemical, biological, or physical form or to render it more amenable for disposal or recovery of materials or energy, or the transfer of solid waste materials but excluding the transportation of solid waste."

When these two definitions are examined in isolation, Salvage appears to be a "solid waste processing facility" which would be required to get a permit under 329 IAC 2-8-1. However, 329 IAC 2-2-

1(55) is the operative definition because it specifically defines the term "solid waste processing facility" as follows:

> "(55) 'Solid waste processing facility' means a solid waste facility upon which is located a solid waste incinerator, transfer station, solid waste baler, solid waste shredder, resource recovery system, composting facility, or garbage grinding facility." (Emphasis added).

Whether or not Salvage falls under the specific definition of "solid waste processing" hinges upon the definition of "transfer station." Arguably, Salvage's activities of off-loading from railroad cars to trucks meet the dictionary definition of transfer. However, "transfer station" is specifically defined in 329 IAC 2-2-1(58) as follows:

> "(58) 'Transfer station' means a facility at which solid waste is transferred into larger capacity vehicles or containers for further transportation but shall not include neighborhood recycling collection centers or transfer activities at generating facilities."

It appears that Salvage's activities do not meet this definition because the solid waste is transferred into vehicles which have a smaller capacity than the railroad cars (the vehicles which brought the waste to the site). However, the definition is ambiguous and it could be construed as meaning vehicles which are larger than the facility. If a statute is ambiguous, the court is to interpret it "in order to ascertain and effectuate the general intent of the legislature." Economy Oil Co. v. Indiana Dept. of State Revenue (1974), 162 Ind. App. 658, 321 N.E.2d 215, 218. Furthermore, it cannot be presumed that the legislature intended to do an absurd thing. Indianapolis Union R. Co. v. Waddington (1907), 169 Ind. 448, 82 N.E. 1030. If the term "transfer station" were interpreted to only cover facilities at which trash was transferred from small vehicles to larger ones, there would be an

absurd result. The railroad cars serve as collection depots and pose the same dangers.

The legislature clarified this ambiguity and sought to avoid absurd interpretations of the statute with the passage of P.L. 19-1990, Sec. 19 (after the onset of this litigation). 329 IAC 2-2-1(a) states that the definitions found in I.C. 13-7-1 apply throughout the article. P.L. 19-1990, Sec. 19 states:

> "IC 13-7-1-24.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS: Sec. 24.5. 'Transfer station' means a facility where solid waste is transferred from a vehicle or a container <u>to another</u> <u>vehicle or container for transportation</u>. The term does not include the following:
>
> (1) A facility where the solid waste that is transferred has been generated by the facility.
>
> (2) A recycling facility."

(emphasis added).

It is true that where the

legislature amends a statute, it is presumed that it intended to change its meaning. Lake County Beverage Company v. 21st Amendment (1982), Ind. App., 441 N.E.2d 1008. However, this presumption "will not apply if it appears that the amendment was made only to express the original intention of the legislature more clearly." Pike County v. State ex rel. Hardin (1984), Ind. App., 469 N.E.2d 1188, 1194. The presumption is rebutted in the instant case. This new definition of transfer station was added to clear up the previous ambiguity and to avoid an absurd result. The following language in P.L. 19-1990, § 41, makes it clear that the additional language in the definition of the term "transfer station" is a clarification rather than a change in the law:

> "SECTION 41. (a) IC 13-7-1-24.5 as added by this act, and IC 13-7-10-1(f), as added by this act,

are clarifications only and should not be construed as modifications of existing law.

(b) IC 13-7-1-24.5 and IC 111(f) do not affect:

(1) rights or liabilities accrued;
(2) penalties incurred;
(3) violations committed; or
(4) legal proceedings commenced;

before the date IC 13-7-1-24.5 and IC 13-7-10-1(f) become effective."

This is not a retroactive application of a change but merely a clarification. We can use this clarification to ascertain the legislative intent. With this clarification of the term "transfer station," Salvage clearly comes under the definition of a "waste processing facility" because it is transferring solid waste from one vehicle or container (railroad cars) through its building to another vehicle or container (trucks) for transportation. Therefore, Salvage was required to get a permit under

329 IAC 2-8-1.

Issue II - Vagueness of the Statutes and Regulations

Salvage, in its reply brief, argues that the very fact that P.L. 19-1990, § 19, was necessary to clarify the ambiguities in the Board's regulations demonstrates that the regulations are unconstitutionally vague because they do not give fair warning to Salvage that it is a solid waste processing facility which is required to get a permit. The Board's regulations are not unconstitutionally vague. There is some ambiguity in the term transfer station. As noted earlier, this term is important because once it is ascertained that Salvage is a transfer station then it follows that it is a solid waste processing facility which is required to get a permit under 329 IAC 2-8-1.

In Robinson v. United States (1945), 324 U.S. 282, the Supreme Court

stated that not all ambiguities in statutes negate fair notice and rise to the level of unconstitutional vagueness. In Robinson, the Court noted that "in most English words and phrases there lurk uncertainties." Id. at 286.

Economic regulations, such as the one at issue here, are examined with less scrutiny than those that impose criminal penalties. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1981), 455 U.S. 489. There is a strong presumptive validity of legislation. Van Sant v. State (1988), Ind. App., 523 N.E.2d 229. Case law indicates that the rules of statutory construction are used to save a statute from being unconstitutionally vague. See, e.g., Van Sant, supra.

In the case at bar, construing the Board's regulations to require Salvage to get a solid waste permit does not make the regulations unconstitutionally vague.

As noted earlier, such an interpretation furthers the probable legislative intent and prevents an absurd result. Therefore, such a construction is in keeping with the rules of statutory construction, gives fair notice and is not unconstitutionally vague. See Economy Oil, supra; Waldron, supra.

Issue III - Estoppel

Salvage next claims that Mr. Poe, Chief of the Facility Inspection Section of the Department for Southern Indiana, told Mr. Schopp of Salvage that a permit was not necessary and, therefore, the Department is estopped from requiring Salvage to close until a permit is obtained, even if a permit is required.

Generally, reliance on misinformation provided by a government employee is not a basis for estoppel because the government could be precluded from functioning if it were bound by its

employees' unauthorized representations. See, e.g., Gressley v. Califano (7th Cir. 1979), 609 F.2d 1265. Our courts are especially reluctant to apply equitable estoppel against the government "where the unauthorized acts of public officials somehow implicate government spending powers." Cablevision of Chicago v. Colby Cable Corp. (1981), 417 N.E.2d 348, 354; Mazac v. City of Michigan City (1934), 98 Ind. App. 366, 189 N.E. 400. Even if public spending is not involved, our courts are reluctant to apply equitable estoppel unless the elements of equitable estoppel are present and unless it is in the public interest to apply the doctrine. Cablevision, supra.

"The elements of equitable estoppel are:

> (1) A representation or concealment of material facts;
>
> (2) The representation must have been made with knowledge of the

facts;

(3) The party to whom it was made must have been ignorant of the matter;

(4) It must have been made with the intention that the other party should act upon it;

(5) The other party must have been induced to act upon it."

Advisory Board of Zoning Appeals of the City of Hammond v. The Foundation for Comprehensive Mental Health, Inc. (1986), Ind. App., 497 N.E.2d 1089, 1092.

In the case at bar, even if the trier of fact, the judge, believed Mr. Schopp's testimony, all five elements of equitable estoppel are not present. First we note that the court was not obligated to believe Mr. Schopp. Morphew v. Morphew (1981), Ind. App., 419 N.E.2d 770. Contrary to Salvage's contentions, "in Indiana, uncontroverted evidence is not necessarily binding on the trier of fact. It may be disbelieved and

given no weight." Id. at 777. Mr. Schopp of Salvage testified about an unmemorialized, unwitnessed conversation he had with Mr. Poe, a Department official, in which Schopp alleges that Poe told him that a permit was not necessary.

Mr. Schopp inquired of a Department receptionist about talking to someone about a "question on solid waste." (R.199). Schopp did not tell the receptionist that he needed to speak with someone about permit requirements. He was referred to Mr. Poe; however, Poe was not authorized to make decisions regarding permits. These decisions are made at the deputy commissioner level.

Schopp testified that he spoke with Poe in the hallway outside Poe's office for about half an hour and told Poe the details of the proposed operation without the aid of diagrams or plans. Schopp stated that Poe offered a few

suggestions. Schopp also claims that he asked Poe if a permit was needed for such an operation and that Poe represented to him that a permit would not be required. Salvage alleges that it entered into several contracts and proceeded with its operations in reliance upon Poe's alleged representations.

Victoria Schopp, President of Salvage, testified that Poe stated at a September, 1989, meeting that he could not remember what he told Curtis Schopp, though Poe said he remembered having met with Schopp. Salvage attempted to bolster Mr. Schopp's credibility regarding the conversation with Poe by eliciting testimony from two individuals to the effect that they each also had asked Poe and another lower level Department official whether or not permits were required for operations similar to those of Salvage. Both men testified that they were orally

told that no permit was required.

Even if the court believed Mr. Schopp's testimony regarding the conversation with Mr. Poe, the court correctly found that the elements of equitable estoppel were not present. The court stated the following, in its Conclusions of Law:

> "Actions based on oral confirmation and approval, without written confirmation and approval, are open to conflicting interpretations and the authority of those making any such statements. Placing full reliance on such oral expressions is to say the least hazardous and it is a practice which is not to be condoned."

(R.82).

Contrary to Salvage's contentions, this does not mean that the court held that oral representations can never be the basis for estoppel. The court simply expressed concern about the wisdom of relying upon oral representation such as the one in the instant case. The court was

correctly stating that even if Poe made such a statement it was not reasonable for Salvage to rely on it because, under the circumstances, Poe did not have sufficient knowledge of Salvage's operation to make such a statement. Therefore, not all of the elements of equitable estoppel were present. See Advisory Board, supra.

Even if the elements of estoppel were present, in order to apply the doctrine against the government, it must be in the public interest to do so. Cablevision, supra. In the case at bar, Mr. Poe was not authorized to make decisions regarding permits. If he made a representation that a permit was not required, it was the kind of unauthorized representation by a government employee that has fostered the general rule that unauthorized misinformation by a government employee is not the basis of estoppel because estoppel based on such

representations could stop the government from functioning. Gressley, supra.

Indiana courts have occasionally applied a public interest exception to this general rule. See, e.g., Cablevision, supra. Unfortunately, the decisions have done little to define when it is that public policy favors rather than opposes the application of estoppel. Samplawski v. City of Portage (1987), Ind. App., 512 N.E.2d 456, 459. In Samplawski, this court stated:

> "[I]t would appear to favor the public interest that citizens be able to rely upon the representations made by their public officials, yet that interest is clearly outweighed in the statement of the general rule. Perhaps it is sufficient for present purposes to state that for an exception to the general rule to apply, there must be an articulable public policy reason which the court determines outweighs the public policy that supports denying estoppel."

Id.

In Advisory Board, the court

found that the public interest would be threatened when the city, under its ordinance, issued building permits to a mental health foundation and then, after the foundation spent $151,000 for renovation, the city said, at the last minute, the foundation could not use the building as planned for a home for children in need of services. Salvage argues that there is no difference between the case at bar and Advisory Board. Salvage argues that it too expended large sums of money based on the government representation and that is the public policy exception noted in Advisory Board.

There are distinctions between the instant case and Advisory Board. In Advisory Board, the foundation relied upon an authoritative representation - an ordinance - as opposed to the unauthorized representation allegedly made by Mr. Poe. It is true that the main policy behind

Advisory Board is the interest any citizen has when it expends large sums based upon government's assurances that it can do something. Advisory Board, supra at 1092. However, in the case at bar, Salvage is a private business which faces a potential economic hazard as opposed to a charitable foundation like the one in Advisory Board. Another important distinction is that the foundation in Advisory Board in effect had a permit revoked, whereas Salvage never even applied for a permit.

Moreover, Samplawski, supra, indicates that we are to give deference to the trial court's weighing of the countervailing public policies. The public policy in favor of protecting Salvage's economic interests is outweighed by the countervailing public policy of protecting the citizenry by disallowing any facility which contributes to pollution without

prior approval of the Department.[1] Therefore, even if the elements of estoppel were present, the government is not bound, in the instant case, because the public interest exception has not been satisfied.

Issue IV - Requirements for Injunctive Relief

Salvage claims that the trial court erred because it granted an injunction without any finding of (1) irreparable injury, (2) inadequacy of a remedy at law, (3) lack of capability of

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[1] IC 13-7-4-1 requires any facility which may cause pollution to get prior approval from the Department. IC 13-7-4-1 provides in pertinent part as follows:

> Sec. 1. No person may do any of the following
>
> * * *
>
> (6) Construct, install, operate, conduct, or modify, without prior approval of the department, any equipment or facility of any type which may cause or contribute to pollution or which may be designed to prevent pollution. .

(emphasis added).

curing any environmental threat posed by Salvage's operation, or (4) that a balance of all the equities, including both public and private interests affected, favored an injunction. We begin by examining the standard for reviewing the grant of an injunction.

As the Department correctly points out in its brief, Salvage carries a heavy burden to overturn the injunction. The standard for appellate review has been summarized as follows:

> "We recognize that the grant or denial of an injunction is a discretionary matter for the trial judge, whose action will be reversed only upon a showing of abuse. As a court of appeal we engage in any reasonable presumption in favor of the trial court; we do not presume error, but affirm the trial court's decision if it is sustainable on any valid legal theory. Our judgment is not substituted for the trial court's even though the circumstances might have justified a different result. Rather, only when the trial court's action was clearly against the logic and effect of

> the circumstances will an abuse of discretion be found on appeal."

State ex rel Stream Pollution Control Board v. Town of Wolcott (1982), Ind. App., 433 N.E.2d 62, 65. (citations omitted).

Salvage claims that the court erred by granting the injunction without a finding that there was no adequate remedy at law. We disagree. In the instant case, no such finding was necessary.

IC 13-7-12-2, which authorizes the Department to seek injunctive relief reads as follows:

> "In addition to the authority contained in section 1 of this chapter, and not withstanding any other provision of this article, the commissioner, upon receipt of evidence that a pollution source or combination of sources, including an industrial user of a publicly owned treatment plant, is presenting an imminent and substantial endangerment to the health of persons, or to the welfare of persons where such endangerment is to the livelihood of such persons, shall bring suit on behalf of the state in the appropriate court to immediately

> restrain any person causing or contributing to the alleged pollution to stop the discharge or introduction of contaminants causing or contributing to such pollution or to take such action as may be necessary."

(emphasis added).

By enacting I.C. 13-7-2-12, the legislature has declared that if any pollution source poses an imminent and substantial endangerment, there is no adequate remedy at law. See Union Ins. v. State Ex Rel Ind. Dept. of Insurance (1980), Ind. App., 401 N.E.2d 1372. No separate proof or finding of this element is required. Id. "It is within the power of the Indiana General Assembly to modify common law rules and remedies." Id. at 1375.

In the instant case, the permit requirement is to protect the public from inherent dangers of waste processing facilities through inspection by the Department and through correction of

potential hazards. Therefore, a facility without a permit posses an imminent and substantial endangerment to the health and welfare of the people in the area. Failure by such a facility to obtain a permit, therefore, is a situation in which no adequate remedy at law exists. Even if I.C. 13-7-2-12 is not interpreted as authorizing an injunction, in this case injunctive relief would be allowed without proof or findings that no adequate remedy at law exists because the protection of the public welfare is involved. See State ex rel Indiana State Board of Dental Examiners v. Boston System Dentists, Etc. (1939), 215 Ind. 485, 19 N.E.2d 949.

Salvage cites Amoco Production Company v. Gambell (1987), 480 U.S. 531, for the proposition that the equities must be balanced even when violation of a statute is sought to be prevented. Amoco does not stand for that proposition. The

Court in Amoco stated that existence of a federal statute did not restrict the court's jurisdiction in equity. Id. This means that, even when a statute is involved, the trial court may balance the equities. The opinion does not state that in a situation such as the case at bar, the trial court is obligated to balance the equities when the acts sought to be enjoined have been declared unlawful or declared against the public interest. It is true, as Salvage has pointed out, that some other federal circuit courts have held that it is an abuse of discretion for a trial court to presume irreparable harm and not to explicitly apply the traditional equitable standards in determining whether an injunction is appropriate for remedying environmental statutory violations. See, e.g., Natural Resources Defense Council v. Texaco (3rd Cir. 1990), 906 F.2d 934.

However, in United States

Environmental Protection Agency v. Environmental Waste Control, Inc. (7th Cir. 1990), 917 F.2d 327, 332, the Seventh Circuit Court of Appeals disagreed, stating that:

> "the law of injunctions differs with respect to governmental plaintiffs . . . as opposed to private 'injunctive relief is proper, without resort to balancing.' Legislation, the emphasis shifts from irreparable injury to concern for the general public interest."

(citations omitted).

Furthermore, in Rees v. Panhandle Eastern Pipeline (1978), 176 Ind. App. 597, 377 N.E.2d 640, we stated:

> "[W]hen acts sought to be enjoined have been declared unlawful or declared against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor."

Id. at 649.

Salvage's acts have been declared unlawful. As noted earlier in this opinion, I.C. 13-7-5-4 declares that "no

person may operate . . . a facility that contributes to pollution . . . without prior approval . . ." of the Department. Furthermore, Salvage's operations are unlawful under the regulations of the Board. Additionally, Salvage's unapproved operation, with box cars which contain up to 95 tons of garbage - often sitting for days without being unloaded - is not in the public interest because of the potential health hazards.

Here, the trial court was also correct in granting the injunction and in not accepting Salvage's assurances that they would operate in an environmentally suitable way while seeking a permit. In Wolcott, supra, a case involving an open dump, we said that the trial court erred in not granting an injunction and by accepting the owner's assurances that he would clean up and improve the area.

Indiana has not abandoned the

Rees rule. The trial court did not abuse its discretion, under the circumstances of this case, by granting an injunction without expressly balancing the hardships and without finding irreparable injury.

Issue V - Commerce Clause

Salvage claims the trial court did not consider whether or not the Department's efforts to block Salvage's off-loading operation by requiring a permit controverted the Commerce Clause of the United States Constitution. At final argument, the trial court indicated it would reserve the commerce clause issue for another day.

It is true that waste has been deemed to be "commerce" and that states cannot ban the importation of waste from other states. City of Philadelphia v. New Jersey (1978), 437 U.S. 617. However, this case does not involve a ban nor is it an

obvious case of protectionism as in City of Philadelphia. Unlike the statutes and regulations in the instant case, in the City of Philadelphia, supra, the New Jersey statute[2] did not evenhandedly regulate all facilities that processed or disposed of waste (regardless of the origin of the waste). The New Jersey statute regulated the importation of waste rather than the facilities which handled the waste. It effectively prevented out-of-state waste from entering New Jersey.

Interpreting the Board's regulation to cover operations such as Salvage's is not a ban but an "evenhanded" requirement that such operations get permits in order to protect the public health and safety. See Pike v. Bruce Church (1970), 397 U.S. 137. Transfer stations at which trash is transferred into

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[2] N.J. Stat. Ann. § 13:1I-10.

larger trucks have long been required to obtain permits under the same regulation. See 329 IAC 2-2-1(58) and 329 IAC 2-3-1. Salvage is, in effect, arguing that it is acceptable to apply the Board's regulation to transfer stations handling primarily local waste but not to apply the regulations to facilities handling out-of-state waste.

In Pike (1970), 397 U.S. 137, the Supreme Court stated the standard for determining the validity of statutes that impact interstate commerce but regulate "evenhandedly" as follows:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest

> involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Id. at 142. (citations omitted).

The Department's construction of its regulation meets the standards of Pike. The regulation (1) effectuates a legitimate local interest, (2) has only incidental effects on interstate commerce, and (3) does not burden commerce excessively in relation to local benefits. Id.

Railroad cars which transport waste certainly have the potential to leak unhealthy substances and to emit foul odors. The state has a legitimate interest in protecting the health and safety of its citizens. Requiring facilities which handle railroad cars containing out-of-state waste to obtain permits places no greater burden on these facilities than facilities which handle primarily intrastate waste. The regulation is narrowly tailored to meet the State's

legitimate interests.

Salvage's contention that the Department's interpretation of the regulation is deserving of strict scrutiny because it is protectionistic, as evidenced by an Executive Order issued by Governor Bayh, is incorrect.[3] A primary purpose of the Executive Order was to notify haulers who bring waste in from out-of-state that they must obey the health and safety regulations of Indiana. The Executive Order was not only dated after the events giving rise to this case but, moreover, it was dated two weeks after the Department commenced this case.

Furthermore, as noted earlier, failure to enforce the regulation against facilities receiving waste by rail would actually be giving them preferential treatment. Salvage has not demonstrated

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[3] Executive Order 89-17.

that the regulations are not neutral or "evenhanded." Therefore, if there was any error committed by the trial court in not considering the Commerce Clause implications, it was harmless.

Issue VI - Pre-emption

Salvage's final argument is that the preliminary injunction should be overturned because it claims that the Department's effort to impose a license requirement upon Salvage is pre-empted by federal law and the trial court lacked subject matter jurisdiction to grant the Department the relief it sought. Salvage is incorrect in its claim that the trial court lacked subject matter jurisdiction.

Underlying Salvage's claim is the premise that federal issues must be tried in federal courts and cannot first go through the state process. That is not true. See Huffman v. Pursue Ltd. (1975),

420 U.S. 592. Furthermore, in the first instance it is the trial court that determines whether or not it has subject matter jurisdiction. We have stated that:

> "Where the record does not disclose the lack of jurisdiction, we cannot presume that it was absent. If we indulge in any presumption, it must be in favor of the trial court's action."

Schoffstall v. Failey (1979), 180 Ind. App. 528, 532, 389 N.E.2d 361, 364.

The trial court did not err in finding that it had subject matter jurisdiction. Furthermore, the Department's regulations at issue which require a permit for Salvage's facilities were not pre-empted by the Interstate Commerce Act, contrary to Salvage's contentions. The United States Supreme Court has stated that:

> "Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated

> subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'"

Chicago & N.W. Transportation v. Kalo Bucks Tile (1981), 450 U.S. 311, 317 (quoting Florida Limes Avocado Growers, Inc. v. Paul (1963), 373 U.S. 132, 142).

The rationale of the pre-emption doctrine is that the Supremacy Clause invalidates state laws that "interfere with or are contrary to the laws of Congress. . . ." Chicago & N.W. Transportation, supra, at 317. An interstate commerce preemption determination has a checklist:.

> "'. . . [A] court must find local law pre-empted by federal regulation whenever the challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Making this determination 'is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.' And in deciding whether any conflict is present, a court's concern is necessarily

> with 'the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted.'"

Id. (citations omitted).

There have been several cases in which local laws were found to be pre-empted; however, the regulations and the subject matter of those regulations were much different than those in the present case. The Supreme Court has held that state statutes attempting to regulate rates of a rail common carrier are clearly pre-empted. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co. (1907), 204 U.S. 426. In Transit Comm'n v. United States (1933), 289 U.S. 121, the Supreme Court held that the Interstate Commerce Commission had exclusive statutory authority to regulate extensions of service and that the state commission could not act in the same area. In City of Chicago v. Atchinson T. & S.F.R.R. (1958), 357 U.S.

77, the Supreme Court held that a city ordinance which required a railroad to get a license before it could transfer passengers was pre-empted because carriers were authorized to do that by the Interstate Commerce Act. Additionally, it has been held that the Interstate Commerce Commission has been given broad power by Congress to regulate a carrier's permanent or temporary cessation of service over lines used for interstate commerce and states cannot regulate in that area. Chicago N.W. Transportation, supra. "State efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." Id. at 319.

Here, federal authority does not extend to health and safety regulations over Salvage's facilities. That is what is at issue here - whether the Department is pre-empted from requiring a permit for

Salvage's facilities at which the waste is to be unloaded. This is not a case involving rates or routes of a common carrier which would clearly be pre-empted by the Interstate Commerce Act. Furthermore, no argument is presented that Salvage is even a common carrier which would bring its facilities under the purview of the Act. Since Salvage's facilities are not directly covered by the provisions of the Interstate Commerce Act, the only question that remains is whether the permit requirement, when applied to Salvage's operations, "is 'inconsistent' with the policy of the Interstate Commerce Act to foster efficient interstate transportation." City of Chicago, supra, at 83.

The Supreme Court has stated that "local authorities are not foreclosed from regulating matters of local concern merely because there may be some incidental, but

not burdensome, effect on interstate commerce." Id. at 90. "[B]ecause regulation of local incidents of interstate transportation is, as a practical matter beyond the effective reach of Congress, there would frequently be an undesirable absence of needed regulation unless states and municipalities were free to act." Id. Even if it were determined that Salvage's operation was an "incident" of transportation, simply requiring a permit for the facility is not burdensome. The Interstate Commerce Act does not regulate the facilities to ensure that waste is unloaded in an environmentally sound manner - even though such requirements are obviously desirable.

Salvage argues, in effect, that any company that has a railroad siding can unload anything at its facility without being subject to local health, safety, or environmental regulation merely because the

cargo was off-loaded from a railroad car. This is an untenable position. Local health, safety and environmental regulations covering Salvage's facilities do not interfere with or come into conflict with federal laws governing the activities covered by the Interstate Commerce Act. Moreover, the Department permit requirement is not inconsistent with the general policies behind the Interstate Commerce Act.

For all of the foregoing reasons, we affirm.

CHEZEM, J. and ROBERTSON, J. CONCURRING.

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION COUNTY CIRCUIT COURT CAUSE NO. 49C01-8910-MI-3752

COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Plaintiff,

vs.

NATIONAL SALVAGE & SERVICE CORPORATION,

Defendant.

JUDGMENT

Having considered all of the evidence and the arguments of counsel and having made its findings and conclusions,

IT IS NOW ORDERED, ADJUDGED and DECREED as follows:

1. The Defendant shall cease and desist from operating any facility in the State of Indiana which handles solid waste, including the removal of waste from railroad boxcars and placement into trucks for later disposal, or the removal of solid

waste from one vehicle to another, without first obtaining a solid waste permit from the Commissioner of the Indiana Department of Environmental Management.

2. Defendant shall cease operations at 1931 Stout Field Drive until such time as it receives a solid waste permit from the plaintiff.

HONORABLE JOHN M. RYAN, JUDGE
Marion County Circuit Court

STATE OF INDIANA)		IN THE MARION
)	SS	COUNTY CIRCUIT
COUNTY OF MARION)		COURT CAUSE NO.
		49C01-8910-MI-3752

COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Plaintiff,

vs.

NATIONAL SALVAGE & SERVICE CORPORATION,

Defendant.

This cause came for a hearing on November 15, 1989 pursuant to notice. Plaintiff was represented by Linley E. Pearson, Attorney General of Indiana, by Michael Schaefer and Mary Ann Habeeb, Deputies Attorney General. The Defendant was represented by George Plews, Peter M. Racher and Sue Shadley, attorneys-at-law. A written motion for findings of fact and conclusion of law having been filed, the Court now makes the following findings, conclusions of law and judgment.

FINDINGS OF FACT

3. The Indiana Department of Environmental Management (herein after referred to as IDEM) is an administrative agency of the State of Indiana which is organized, established and existing by virtue of I.C. 13-7-2-11.

4. The Environmental Management Act, I.C. 13-7-5-7 authorizes court actions by the Commissioner of the Indiana Department of Environmental Management Act to see injunctive relief to procure compliance with said Act.

5. The Defendant is an Indiana corporation and was incorporated On January 13, 1988.

6. On or about July 31, 1989 the Defendant entered into a lease of the premises referred to as 1931 Stout Field Drive in Indianapolis, Indiana.

7. Prior to this in June the Defendant had placed an ad in a trade

publication for the receipt and disposable of both loose and solid waste.

8. Curtis Schopp, the vice-president of National Salvage had visited the offices of IDEM sometime in February, 1989 prior to the commencement of operations. He had gone to IDEM to inquire about both the disposal of special and solid waste. While there had a visit with a Mr. Poe and testified that he explained the operation to Poe and was informed orally that no permit was required. No written confirmation of this was ever obtained.

9. National Salvage places great reliance on this oral opinion.

10. The leased premises is served by a railroad spur line and facing the railroad tracks on one wall are two doors which the contents of a railroad car may be brought into the building. On an adjoining wall of the building are two bays

which are suitable for loading trailer trucks from the interior of the building. There is no permitted landfill or other disposal facility at these premises.

11. On or about August 9, 1989 the Defendant entered into an agreement under which it would dump waste material at the Northside Landfill in Boone County.

12. On or about September 8, 1989 the Defendant entered into a lease for three Dorsey "open top/walking floor" trailers.

13. On or about October 6, 1989 the Defendant entered into a master lease agreement for three Mack trucks.

14. On or about October 11, 1989 the Defendant entered into a lease for up to 120 60-foot boxcars numbered NSSX 5000 through NSSX 5119.

15. Between the dates of October 13, 1989 and October 19, 1989 at least twelve (12) railroad boxcars were placed at

the Defendant's leased premises, solid waste was unloaded into Defendant's building and put into truck trailers. Once placed on the abutting siding the railroad cars waited from one to three days for unloading.

16. Each of these railroad boxcars contained baled municipal solid waste.

17. The basic business of the Defendant was to transfer bales of solid waste from the railroad cars to their warehouse. Such waste would then be loaded on trucks to be taken to the Northside Landfill. It would take about three and one half truck loads of material to unload one railroad car.

18. Operation would be accomplished by bringing the railroad car to the side of the building where forklift trucks would unload it into the warehouse

and then would place it in trucks for transport to the landfill.

19. Defendant also has an agreement with a Star Recycling Company under which the Defendant would receive unrecyclable material from Star Recycling. This material included what is commonly known as garbage.

20. On October 23, 1989 five (5) railroad boxcars loaded with solid waste were observed at the Defendant's facility. Some of these cars were observed emitting a liquid of some sort.

21. Railroad boxcars originating from Star Recycling and on which the NSSX registration numbers were visible were observed on October 27, 1989 on a railroad siding between Minnesota Street and Airport Expressway next to the Bridgeport Brass Company. Again it was observed that each of these cars were emitting some sort of a liquid.

22. No test were ever performed on the liquid coming from said boxcars.

23. The plaintiff has never issued a solid waste facility permit of any kind for Defendant's operations at 1931 Stout Field Drive.

24. The question presented is whether this type of operation requires the issuance of a permit by IDEM under existing statutes and regulations.

25. The statutory requirements include I.C. 13-7-4-1(6) and I.C. 13-7-1-22 which provides in part as follows:

26. I.C. 13-7-4-1(6) provides as follows:

> Sec. 1. No person may do any of the following:
>
> (1) Discharge, emit, cause, allow, or threaten to discharge, emit, cause, or allow any contaminant or waste including any noxious odor, either alone or in combination with contaminants from other sources, into the environment or into any

publicly owned treatment works in any form which causes or would cause pollution which violates or would violate rules standards, or discharge or emission requirements adopted by the appropriate board pursuant to this article.

* * *

(3) Deposit any contaminants upon the land in such place and manner which creates, or which would create, a pollution hazard that violates or would violate a rule adopted by one (1) of the boards, or deposit or cause or allow the deposit of any contaminants or solid waste upon the land except through the use of sanitary landfills, incineration, composting, garbage grinding, or another method acceptable to the solid waste management board.

(4) Dump, cause, or allow the open dumping of garbage or of any other solid waste in violation of rules adopted by the solid waste management board.

* * *

(6) Construct, install, operate, conduct, or modify, without prior approval of the

> department, any equipment or facility of any type which may cause or contribute to pollution or which may be designed to prevent pollution. However, the commissioner or the appropriate board may approve experimental uses of equipment, facility, or pollution control device as is deemed necessary for the further development of the state of the art of pollution control.

27. I.C. 13-7-1-22 provides as follows:

> "Solid waste" means any garbage, refuse, sludge from a waste treatment plant, sludge from a water supply treatment plant, sludge from an air pollution control facility, or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, or agricultural operations or from community activities.

28. Pertinent regulations include 329 IAC 2-2-1(a)(53), 329 IAC 2-2-1-(a)(41) and 329 IAC 2-3-1(6) the later containing the only relevant exclusion of

regulation in this matter and such regulations are as follows:

29. 329 IAC 2-2-1(a)(53) defines the term "solid waste facility" as used above, as follows:

> (53) "Solid waste facility" or "facility" means all contiguous land and structures, other appurtenances, and improvements on the land, used for processing, storing in conjunction with processing or disposal, or disposing of solid waste, and may consist of several processing, storage, or disposal operational units, e.g., one (1) or more landfills, surface impoundments, or combinations thereof.

30. 329 IAC 2-2-1(a)(41) defines the term "processing" as used above, as follows:

> (41) "Processing" means the method, system, or other handling of solid waste so as to change its chemical, biological, or physical form or to render it more amenable for disposal or recovery of materials or energy, or the transfer of solid waste materials but excluding the transportation of solid waste.

31. 329 IAC 2-3-1(6) contains the only relevant exclusion to regulation in this matter and provides as follows:

> The following solid waste management activities are not subject to the provisions of this article:
>
> * * *
>
> (6) Processing, except for incineration, of solid waste which takes place at the generating facility.

CONCLUSIONS OF LAW

1. Actions based on oral representations, without written confirmation and approval, are open to conflicting interpretations and the authority of those making such statements. Placing full reliance on such oral expressions is to say the least hazardous and it is a practice which is not to be condoned.

2. The Defendant's building an operation at 1931 Stout Field Drive

constitutes a solid waste facility, as defined, because it is used for processing or storing. In conjunction with processing of solid waste by virtue of the handling of baled waste and the storing of such waste in railroad boxcars pending unloading and transfer to trucks for the transportation to a disposal site.

3. The Defendant's operation constitutes processing of solid waste because a) it is the handling of solid waste so as to change its physical form, b) it renders the waste more amenable to disposal by virtue of reducing its mass, and c) it is a transfer of solid waste material from one container to another away from the point of generation.

4. The delivery, and acceptance, unloading, and transfer of solid waste at the Defendant's facility thus constitutes a violation of the applicable statute and regulations.

5. While a civil penalty may be imposed the uncontroverted evidence that reliance was placed on the oral representations of Mr. Poe is a mitigating circumstance and no civil penalty is therefore imposed.

6. The plaintiff is however entitled to injunctive relief under the facts of this case and the injunction is therefore granted.

7. The law is with the plaintiff and against the defendant and operations of this type must receive a permit from IDEM.

Dated November 16, 1989

_____

HONORABLE JOHN M. RYAN, JUDGE
Marion County Circuit Court

Ind. Code 13-7-5-7 Court actions by commissioner

Sec. 7. The commissioner may proceed in court, by appropriate action, to:

(1) enforce any final order of the commissioner or of one (1) of the boards;

(2) collect any penalties or fees;

(3) procure or secure compliance with this article or any other law that the department has the duty or power to enforce; or

(4) procure compliance with any standard or rule of one (1) of the boards.

Ind. Code 13-7-12-2 Suit on behalf of state to restrain pollution

Sec. 2. In addition to the authority contained in section 1 of this chapter, and notwithstanding any other provision of this article, the commissioner, upon receipt of evidence that a pollution source or combination of sources, including an industrial user of a publicly owned treatment plant, is presenting an imminent and substantial endangerment to the health of persons, or to the welfare of persons where such endangerment is to the livelihood of such persons, shall bring suit on behalf of the state in the appropriate court to immediately restrain any person causing or contribution to the alleged pollution to stop the discharge or introduction of contaminants causing or

contributing to such pollution or to take such other actin as may be necessary.

329 I.A.C. 2-2-1(b)(55)

"Solid waste processing facility" means a solid waste facility upon which is located a solid waste incinerator, transfer station, solid waste baler, solid waste shredder, resource recovery system, composting facility, or garbage grinding facility.

329 I.A.C. 2-2-1(b)(58)

"Transfer station" means a facility at which solid waste is transferred into larger capacity vehicles or containers for further transportation but shall not include neighborhood recycling collection centers or transfer activities at generating facilities.

329 I.A.C. 2-8-1 Permit requirement

Authority: I.C. 13-1-12-8;
I.C. 13-7-7-5
Affected: I.C. 13-1-3;
I.C. 13-7-13-3;
I.C. 36-9-30-35

Sec. 1.(a) Unless excluded in 329 I.A.C. 2-3, and except for activities related to open dumps under 329 I.A.C. 2-4-4 through 329 I.A.C. 2-4-6, and except as otherwise provided in 329 I.A.C. 2-5, any person who disposes of solid waste or operates a solid waste processing facility must have a solid waste facility permit.

(b) The owner of the facility is responsible for applying for and obtaining

a permit. The owner of the land upon which the facility is located shall also sign the application form acknowledging the land owner's responsibility in accordance with section 7 of this rule.

(c) In the event that, after the permit application is submitted but prior to the issuance of the permit, there is any change that renders the information in the application incorrect, the applicant shall notify the commissioner of the change within fifteen (15) days and submit corrected information within a reasonable period of time.

(d) It shall be grounds to deny a permit, including a renewal permit, to any applicant if such applicant has been convicted under I.C. 13-7-13-3 or I.C. 36-9-30-35 or if such applicant's previous permit to operate under this article, or the previous article, 329 I.A.C. 1.5 has been revoked by the commissioner under I.C. 13-7-10-5.

STATE OF INDIANA
EXECUTIVE DEPARTMENT
INDIANAPOLIS

Executive Order 89-17

FOR: THE MANAGEMENT OF SOLID WASTE IN INDIANA

TO ALL THOSE TO WHOM THESE PRESENTS MAY COME, GREETINGS:

WHEREAS, the Constitution of Indiana provides that the government of this State has been instituted to provide for the peace, safety and well-being of the people of this State, and

WHEREAS, it is my duty as Governor to protect the peace, safety and well-being of the people of this State and to see that the laws are faithfully executed, and

WHEREAS, the General Assembly has enacted legislation recognizing that the improper handling and disposal of solid waste may threaten the public health, safety and well-being, and

WHEREAS, the General Assembly has established the Solid Waste Management Board and has directed it to adopt rules to ensure the safe handling and disposal of solid waste in the State of Indiana, and

WHEREAS, the General Assembly has established the Indiana

Department of Environmental Management and directed it to enforce laws, rules and regulations governing the transportation, processing and disposal of solid waste, and

WHEREAS, the existing sanitary landfills in the State of Indiana are rapidly filling and are estimated to have a total of 8.2 years of capacity remaining for disposal of solid waste at current rates, with much shorter periods for landfills in some areas of the State, and

WHEREAS, rates of solid waste disposal appear to be rising significantly as a result of both increased waste generation in Indiana and increased shipments of solid waste into Indiana for disposal here, and

WHEREAS, effective steps to reduce the volume of waste generated and to recycle waste are preferable to treatment or disposal of ever increasing volumes of solid waste, and

WHEREAS, the solid waste handling and disposal industry in Indiana and elsewhere is undergoing rapid changes in structure, ownership, shipping patterns and competition, and

WHEREAS, as enforced in recent years, Indiana's laws and regulations governing the transportation, processing and disposal of solid

waste cannot effectively protect the public in the face of these rapid changes in the solid waste handling and disposal industry, and

WHEREAS, recent shipments of garbage by rail to Indiana for handling and disposal without lawful permits for unloading the garbage have highlighted both the increase in shipments of garbage for disposal in Indiana and the health hazards that such unlawful shipments can pose for the people of Indiana, and

WHEREAS, the practice of using the same vehicles to transport first garbage and then food, farm products or other products threatens the reputation and integrity of Indiana's farm and other products, and

WHEREAS, the limited capacity of Indiana's existing landfills, the rapid changes in the solid waste handling and disposal industry, and the defects in Indiana's existing laws and regulations governing the transportation, processing and disposal of solid waste require a comprehensive review of Indiana's laws regulating solid waste and Indiana's plans for managing its solid waste for years to come, and

WHEREAS, the solid waste disposal industry is nevertheless now subject to numerous laws and regulations to

protect public health and safety, including solid waste disposal laws, laws regulating the handling and disposal of hazardous wastes and infectious wastes, motor carrier laws and traffic laws, and

WHEREAS, Indiana law provides substantial civil and criminal penalties for violations of laws and regulations that apply to the transportation, processing and disposal of solid waste, and

WHEREAS, criminal penalties may be applied to any person who knowingly or intentionally aids, induces or causes another person to violate any law or regulation governing the transportation, processing or disposal of solid waste, and

WHEREAS, criminal penalties and substantial civil penalties are especially appropriate for those who deliberately violate for their own profit laws protecting the public health and safety,

NOW, THEREFORE, I, EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA, by virtue of the authority vested in me by the Constitution and laws of this State, and in furtherance of my duty to protect the public health and safety, do hereby order:

1. All trains carrying solid waste as freight in the State of Indiana shall have available bills of lading for inspection by the Indiana Department of Environmental Management, the Indiana State Police, or the Indiana

State Board of Health. If the destination of a shipment of solid waste is located in Indiana and is not a solid waste facility with a suitable permit from the Indiana Department of Environmental Management, then:

(a) The shipment of solid waste may not be unloaded in the State of Indiana except at a facility with a suitable solid waste facility permit;

(b) The Department of Environmental Management shall strictly enforce existing laws and regulations applicable to the solid waste shipment (including regulations treating leakage as the disposal of solid waste), shall determine whether the shipper(s), recipient and/or carrier bear any responsibility, civil or criminal, for any violations, and shall initiate appropriate enforcement measures; and

(c) The Department of Environmental Management shall take all possible steps to ensure the immediate removal from the State of any such trains that pose a health hazard to the public.

2. The Indiana State Police, including its Motor Carrier Division, shall:

(a) Focus the enforcement of motor carrier laws and regulations on motor carrier shipments of solid waste, inspect such shipments for leakage, strictly enforce applicable motor carrier laws,

and coordinate with the Indiana Department of Environmental Management and the State Board of Health the enforcement of applicable environmental laws and laws regulating the handling and disposal of infectious waste.

(b) Report to the Indiana Department of Environmental Management the weight, destination and origin of shipments of solid waste into Indiana by motor carrier for those shipments weighed in State weigh stations or otherwise inspected by the State Police.

(c) Take all lawful steps to determine whether the Indiana destinations of motor carrier shipments of solid waste have appropriate solid waste facility permits. If the destinations do not have such permits, the State Police shall ensure that the shipments are not unloaded at facilities without appropriate permits.

The Superintendent of the Indiana State Police, the Commissioner of the Indiana Department of Environmental Management and the State Health Commissioner shall each immediately designate a person to coordinate the enforcement efforts of their respective agencies on this subject.

3. The Indiana State Police, Department of Environmental Management and State Board of Health shall:

(a) Offer all available assistance to local law enforcement agencies, health agencies and prosecuting attorneys in enforcement of all applicable laws, regulations and ordinances against illegal handling or disposal of solid waste.

(b) Seek the cooperation and assistance of local law enforcement agencies, health agencies and prosecuting attorneys in pursuing all available remedies against those persons responsible for illegal handling or disposal of solid waste.

4. The Indiana Department of Environmental Management shall immediately begin drafting new solid waste rules to do the following:

(a) Prevent or restrict the use of motor vehicles or rolling stock used to transport solid waste in Indiana for transporting food, farm products or other products.

(b) Establish suitable requirements for all vehicles used for the commercial transportation of solid waste and for enforcement of such requirements through licensing and inspection of vehicles.

(c) Establish a system using bills of lading or manifests to monitor shipments of solid waste by source, destination and carrier.

(d) Ensure that all persons engaged in the solid waste handling and disposal industry in Indiana have the integrity to operate their businesses in compliance with the law by:

(1) Requiring all holders of and applicants for solid waste facility permits to disclose the identities of, and relevant background information concerning, the manager(s) of the facility, corporate officers or partners of any corporation or partnership with an economic interest in the operation of the facility, and all other persons with significant economic interests in the operation of the facility, regardless of the form such interests may take, including stock ownership, partnership, or interest in a trust.

(2) Requiring appropriate background checks for the manager(s) of the facility, corporate officers, partners, and those with significant economic interests in the operation of the facility.

(3) Ensuring that an application for a solid waste facility permit may be denied or a permit revoked if the manager(s) of the facility, a corporate officer,

partner, or any other person with a significant economic interest in the operation of the facility has been convicted of any felony or has been found to have intentionally violated the environmental or health laws of this State, any other State, or the United States, or if the Department of Environmental Management concludes that there are reasonable grounds for believing the facility will not be operated consistently with the public interest.

(e) Ensure that an application for a solid waste facility permit may be denied if the Department of Environmental Management finds that the facility is not needed to serve the solid waste disposal needs of the region in which the facility would be located.

(f) Require the operators of solid waste facilities to provide suitable on-site facilities for recycling of solid waste.

5. The Indiana Department of Environmental Management shall immediately begin preparing a statewide plan for the management of solid waste throughout the State for the next twenty (20) years. The plan shall propose legislation, rulemaking, and administrative steps at the State and local levels to address the following subjects:

(a) Measures to reduce the creation of solid waste.

(b) Recycling, composting and other alternatives to the treatment and disposal of solid waste.

(c) Collection of accurate information concerning current and projected needs for solid waste disposal throughout the State, the capacity of existing solid waste facilities, shopping patterns of solid waste, the economics of the solid waste disposal industry, and projected needs for additional or expanded solid waste facilities.

(d) Development of regional solid waste plans among local governments to promote source reduction and recycling and to plan for the management of the solid waste generated with their boundaries.

(e) Funding mechanisms for measures to manage and regulate solid waste transportation, processing and disposal.

The statewide plan for management of solid waste shall be completed and delivered to the Governor no later than August 31, 1990.

6. The Indiana Department of Environmental Management shall begin preparing legislation for introduction in the General Assembly to do the following:

(a) Encourage to the maximum extent possible measures to reduce the creation of solid waste; such measures may include packaging guidelines, business and consumer education, source reduction goals and standards, and financial incentives and disincentives.

(b) Encourage to the maximum extent possible recycling, composting and other alternatives to the treatment or disposal of solid waste; methods of encouragement may include creating or stimulating markets for recycled products, grants to communities for the development or implementation of recycling plans, bans on the treatment or disposal of specified types of solid waste, business and consumer education, recycling goals and standards, and financial incentives and disincentives.

(c) Mandate development of regional solid waste management plans addressing the following subjects:

(1) source reduction;

(2) recycling, composting and other alternatives to treatment and disposal;

(3) projection of the region's solid waste treatment and disposal needs and available facilities; and

(4) long-range plans for managing the solid waste generated within the region, including funding for new solid waste management facilities.

(d) Establish differential fees for the disposal of solid waste based on the source of the solid waste.

(e) Give enhanced law enforcement powers to trained employees of the Department of Environmental Management to strengthen the Department's enforcement powers.

IN TESTIMONY WHEREOF, I have hereunto set may hand and caused to be affixed the great seal of the State of Indiana, at the Capitol, in the City of Indianapolis, this 9th day of November, 1989.

BY THE GOVERNOR: Evan Bayh, Governor of Indiana

ATTEST: Joseph H. Hogsett
Secretary of State

Supreme Court, U.S.
FILED
SEP 22 1992
OFFICE OF THE CLERK

No. 92-238

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

NATIONAL SALVAGE & SERVICE CORPORATION,
Petitioner,

v.

COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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COUNSEL FOR PETITIONER

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PETITIONER'S REPLY MEMORANDUM

Respondent Commissioner of the Indiana Department of Environmental Management ("IDEM") attempts to discount the importance of IDEM's due process violation in this case by suggesting that no remedy exists for the violation and that all that is at stake is whether National Salvage and Service Corporation ("National Salvage") operated a "transfer station."[1] IDEM argues that because the legislature changed the definition of "transfer station"[2] after this case was filed to include National Salvage's business, the case is moot. IDEM claims that even if the original injunction was wrong, National Salvage now cannot operate without a permit and has no damage or remedy. That is not what this case is about, and the case is not moot.

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[1]IDEM raised this contention for the first time in its opposition brief.

[2]P.L. 19-1900, codified at Ind. Code 13-7-1-24.5.

A. What The Case Is About

This case concerns whether Indiana, consistent with due process, may enjoin National Salvage from operating without a permit based on an IDEM rule that has now been construed by Indiana's courts to mean exactly the opposite of what its words actually state and exactly the opposite of the way it always has been understood. The due process clause forbids Indiana from doing this. The requirement of fair notice means that a regulation saying "black" cannot be rewritten by a State to mean "white" and then applied to the citizenry as if the regulation had said "white" all along.

At the time National Salvage was enjoined, "transfer station" was defined as a facility where solid waste "is transferred into larger capacity vehicles or containers for further transportation. . . ." 329 Indiana

Administrative Code 2-2-1(b)(58) (emphasis added). National Salvage transported waste from a train car into a smaller vehicle, a truck. The Indiana Court of Appeals held that the IDEM definition of "transfer station" really meant a facility where waste is transferred from one vehicle or container into another for further transportation. The due process question this case raises is whether Indiana thus may destroy a citizen's business and expose the citizen to $25,000-per-day fines and potential criminal penalties based on the Indiana court's construction -- a construction that is at odds with the way IDEM told National Salvage the rule should be read and the way IDEM and everyone else (except the Indiana Court of Appeals) had always understood the rule.

B. Why The Issue Is Not Moot

This case is not moot, as IDEM suggests, for at last three reasons. First, if the petition for a writ of certiorari is granted and if the injunction is found to have been wrongfully issued, then National Salvage will have a substantial damage action against IDEM for wrongful injunction. Rule 65(C) of the Indiana rules of trial procedure provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who was found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.[3]

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[3]Indiana's Trial Rule 65(C) differs from the parallel federal rule in that Indiana specifically guarantees government liability for wrongful injunction.

Indiana cases agree that damages for wrongful injunction are available from government agencies. See, e.g., Howard D. Johnson Co. v. Parkside Development Corp., 348 N.E.2d 656, 662 (Ind. App. 1976). In this case, the damages are significant. The uncontradicted testimony at trial showed that National Salvage had suffered damages of at least $4,000 per day since it was ordered to cease operating in October 1989. A claim for wrongful injunction is not a tort claim that might be barred under Indiana's tort claims statute, Ind. Code 34-4-16.5, as IDEM suggests in footnote 3 in its opposition brief.

Second, if the injunction is found to have been wrongfully issued, National Salvage will have an action for damages against IDEM arising under 42 U.S.C. § 1983 for IDEM's deprivation of National

Salvage's due process rights.[4] National Salvage already has filed a counterclaim against IDEM for damages, among other items of relief, arising from IDEM's wrongful prosecution of its enforcement action. See "Answer and Counterclaim for Preliminary and Permanent Injunctive Relief and Damages," Record of Proceedings, p. 33. The counterclaim will go forward if National Salvage is successful in this Court, and the counterclaim will provide redress for the due process violation that has occurred.[5]

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[4]Such a claim, like a claim under Rule 65(C) of Indiana's trial rules, would not be subject to the limitations of the Indiana Tort Claims Act. Felder v. Casey, 487 U.S. 131 (1988); Werblo v. Hamilton Heights School Corp., 537 N.E.2d 499 (Ind. 1989); Kellogg v. City of Gary, 562 N.E.2d 685 (Ind. 1990).

[5]National Salvage also may have claims for the taking of its property without compensation. See Nollen v. Calif. Coastal Comm'n., 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 1992 WL 142517 (June 29, 1992).

Third, P.L. 19-1990 (now Ind. Code 13-7-1-24.5) expressly provided at Section 19 that nothing in the law affects rights or liabilities accrued or legal proceedings commenced before the statute took effect. The new statute, by its express terms, does not moot any action arising from the meaning of the term "transfer station."

Neither of the cases cited in IDEM's brief suggests that National Salvage's due process claim is moot. In U.S. v. Provenzano, 469 U.S. 14 (1984), the plaintiff sued under the federal Freedom of Information Act and the subsequent amendment of that Act. While the case was pending, the law was changed such that the plaintiff now had access to the information he was suing to obtain. This Court had granted certiorari only on the issue affected by the amendment and thus "[t]he new legislation, as the parties agree, plainly renders moot the single issue with

respect to which certiorari was granted in each of these cases." 469 U.S. at 15. The portion of the case affected by the amended law had become moot only because the plaintiff now had access to the information he sought. Plaintiff had been completely satisfied through the amendment of the law so that he needed no remedy from the Court. As this Court has stated:

> Jurisdiction, properly acquired, may abate if a case becomes moot because (1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied, the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

County of L.A. v. Davis, 440 U.S. 1379, 1380 (1979) (emphasis supplied). In this case, National Salvage in no way has been made whole by P.L. 19-1990. Nothing has occurred to "completely and irrevocably"

eradicate the effects of the wrongful injunction.

Similarly, in DeFunis v. Odegaard, 416 U.S. 312 (1974), a plurality of this Court held a third-year law student's challenge over his law school's admissions policy was moot since the student had nearly completed school and could make no showing of harm from the allegedly discriminatory admissions policy. The DeFunis petitioner was completely satisfied. National Salvage remains harmed. See also New York Transit Authority v. Beazer, 440 U.S. 568 (1978) (lawsuit by former heroin addicts over ordinance excluding such persons from employment held not mooted by change in statute to prevent discrimination).

If this case is moot, then Indiana may avoid liability for due process or other constitutional violations by simply amending its laws after a citizen institutes a challenge in court. P.L. 19-

1990 was enacted in direct response to this well-publicized lawsuit, and the Indiana legislature expressly provided that the new statute would not impair pending legal proceedings. Indiana cannot defeat the petition for a writ of certiorari, and thus avoid compensating National Salvage for the wrongful injunction it has suffered, by amending its statutes to "undo" a pre-enactment due process violation.

National Salvage does not contend that it is exempt from Indiana's police powers or Indiana's environmental rules and statutes. Indiana may, if it chooses, require interstate municipal waste shippers to install railcar liners or impose fines for leaks or smells. What Indiana cannot do is impose a permit requirement where the words of the rule do not state such a requirement exists, especially where the rule is being twisted to keep interstate shipments of waste out of Indiana.

Indiana's police powers are subject to the limits imposed by the U.S. Constitution.

IDEM observes that National Salvage has not applied for any "transfer station" permit. That is unsurprising as well as irrelevant, because by the time P.L. 19-1990 had been enacted to impose, for the first time, a permit requirement, National Salvage had been destroyed.

In sum, the due process question presented here is substantial and not moot. The petition for writ of certiorari should be granted.

Respectfully submitted,

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